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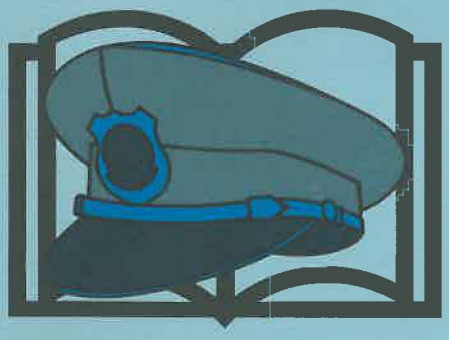

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POLICE ACADEMY
4180 West 4th Avenue, Vancouver, British Columbia, V6R 4J5

ISSUES OF INTEREST

VOLUME NO. 38

Written by John M. Post
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"GROSSLY EXCESSIVE" AND "UNWARRANTED" APPLICATION OF CHOKE-HOLD BEYOND POWERS OF POLICE UNLESS JUSTIFIED DUE TO CIRCUMSTANCES

REGINA v. DRDA - Supreme Court of BC - Vancouver CC 891894, November 1990

The accused passed a truck by driving in the curb lane. An unmarked police car occupied this lane while the officer spoke to a motor cyclist he had pulled over. Apparently the police vehicle was parked in an intersection and the accused observed it too late to come to a stop. As a result there was a collision. The accused produced the usual documents and became uncooperative when asked to get off the road and onto the side walk. After having been "guided" to the side of the road he was informed to be under investigation for impaired driving. The necessary warnings were conveyed to him, and the accused became upset and walked away. When told he had to stay he replied profanely that he would go where he wanted. The officer attempted to physically turn the accused around and when he was resisted he applied the choke-hold rendering the accused unconscious for about 20 seconds.

At the police station the accused tried in vain to contact his lawyer (for about 30 minutes) and said he would not "blow". When the demand for breath samples was repeated the accused said he could not blow.

The accused was acquitted of impaired driving and appealed his conviction of refusing to supply breath samples. He posed two questions as grounds for his appeal.

1. Was the detention lawful?
2. Did he have a reasonable excuse not to comply with the demand.

Needless to say the methods applied to detain the accused were relevant to these issues.

The Supreme Court Justice held that police had the common law right to detain the accused but concluded that the detention was unlawful due to the "grossly excessive and unwarranted" use of the choke-hold in the circumstances. The officer had not called on his partner to assist him and the accused's abusiveness had only been verbal and not of a physical nature. The Crown had not adduced any evidence that a lesser form of restraint would have worked just as well. The actions of the officer had deprived the accused of his fundamental dignity as a person. In the nature of the situation this invasion of his person was neither necessary nor reasonable.

The accused testified that he felt totally blameless for the accident and was choked to unconsciousness in front of a friend. The hold and its consequences had made him feel stripped of dignity and had left him with pain in the throat area and having trouble breathing. There was an inference that the accused and the appeal court were of the view that the officers were possibly affected in their judgement and actions by the fact that their cruiser had just been damaged by the accused.

The accused suggested that a judicial stay of proceedings was an appropriate remedy for the excessive force that had rendered his detention unlawful. The Crown agreed that such a stay was the appropriate remedy but argued that the accused was not entitled to one.

The issue of unlawful detention seemed to hit a dead-end in the legal aspects of this case and apparently was without consequence.

Also the matter of a judicial stay was seemingly not reacted to. The Justice, in conclusion, explored the issue of "reasonable excuse" for not supplying breath samples.

There are several cases where police behaviour supported a reasonable excuse for refusing to blow. The behaviour had given the persons under demand reasonable apprehension of malice, prejudice, unfairness or antagonism on the part of the police. In one case, for instance, the suspect was ordered to strip naked and touch his toes in the presence of a number of officers. There had apparently been no other reason than to humiliate the suspect and laugh at him. In another case rough handling of a suspect had resulted when he was apprehended in his own driveway, refusing to accompany the officers until he was allowed to let his mother know what was happening and give her Christmas parcels he had in his car.

In these and other cases the courts had held that police action had caused a reasonable excuse for the suspects refusing to give samples of their breath.

The unjustified application of the choke-hold that rendered the accused unconscious should have caused the officers to anticipate precisely the response they got. Any citizen treated in the same manner would be upset and feel humiliated. This combined with the discomfort the choke-hold had caused, should have caused the trial judge to find that the accused had a reasonable excuse to refuse. No only an account of the humiliation but also whether he was physically capable to blow. Objectively viewed, the accused had a reasonable excuse for refusing concluded the Court.

Accused's appeal allowed
Acquittal recorded

Comment:

The sequence of events are important in dealing with the Court's decision that the detention was unlawful. The accused had identified himself and consequently the common law as established in *R. v. Moore*[1] did not apply. Moore was a cyclist who ignored a traffic light and was asked to identify himself so a charge under the BC Motor Vehicle Act could be laid. He refused, and

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[1] 5 W.W.R. 1977, 241, BC Court of Appeal - Decision upheld by the Supreme Court of Canada

like Mr. Drda continued on his way. Although the offence was not included in the list for which a warrantless arrest may be effected, the officer physically stopped Moore and arrested him for obstructing a peace officer. The Courts held that refusing to identify oneself in such circumstances amounts to obstruction as failure to do so would effectively paralyse the administration of justice. In terms of statutory provisions and circumstances the Moore case is totally distinct from this Drda case.

The accused identified himself, was escorted to the side walk as he declined to do so on his own upon the request of one of the officers. He was then advised to be under investigation for impaired driving and informed of his right to counsel and the right to remain silent. No arrest was effected and no demand for breath samples was made. Drda then seemed to be of the opinion that he was at liberty to leave the scene and attempted to do so. There are no statutory or specific common law provisions to arrest or detain someone for investigative purposes. If the reasons for judgment accurately reflect on what was conveyed to Drda, he was only told to be under investigation for an arrestable criminal offence. If he was told that the officer had the prerequisite grounds (reasonable and probable grounds) that his ability to operate a motor vehicle was impaired by alcohol or a drug, the issue of right to detain would have been clear. Then the officer could have effected an arrest in the first instance (which is not arbitrary as what was once suggested) or when the suspect attempted to leave. Then the strangle hold should have been a separate issue of whether it amounted to excessive force for which the officer could have been criminally liable according to s. 26 of the Criminal Code of Canada. In other words the arrest and detention were lawful but the means by which they were effected was a criminal offence (assault for instance).

The Supreme Court Justice took (and was forced to take) a different approach to this issue. He found that the officer had a common law right to detain the suspect but that the excessive force had rendered the detention unlawful. He found support for this view in the reasoning of the Ontario Courts[2] and the Supreme Court of Canada[3] in *The Queen v. Dedman* as well as *Cloutier v. Langlois*[4]. The Courts held that to determine the exact scope of common law police powers, the relevant competing interests must be weighed carefully. That is the effectiveness of law enforcement and the rights and freedoms of the individual. The common law providing these powers are to promote effective application of the law, but not to a disproportionate extent in relation to the freedom and rights of the citizens. "It is therefore necessary ..... to determine whether an invasion of individual rights is necessary in order for the peace officers to perform this duty and whether such an invasion is reasonable in light of the public purposes served by effective control of the criminal acts on the one hand, and, on the other, respect for the liberty and fundamental dignity of individuals."

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[2] The Queen v. Dedman - Volume 2, page 8.

[3] The Queen v. Dedman - Volume 22, page 17 of this publication.

[4] Cloutier v. Langlois - Volume 37 of this publication.

As mentioned above the Court found that the officer had the common law right to detain Mr. Drda but that his excessive use of force had rendered the detention unlawful. It is full well realized that the criminal liability of the officer for excessive force in carrying out what he was authorized at common law to do, was not before the Court. However, in view of the provision contained in s. 26 C.C., would it not have been more consistent with our law for the Court to have held that the excessive force by means of which the officer did what he was authorized to do by law, was a separate issue and did not affect the lawfulness of the detention. The precedents referred to seem to address whether or not it is excessive to detain a person in these circumstances, but seem to leave the matter of force by means of which the peace officer sustains or effects that detention at the peril of that officer should that force be excessive. Another remedy (should the means of restraint have amounted to an infringement of the accused's rights under s. 7 of the Charter) seems a judicial stay of proceedings under s. 24 (1) of the Charter. This is what defence counsel suggested, probably expecting that the excessive force would not affect the lawfulness of the detention.

CONSPIRACY TO IMPORT HEROIN
CROWN PROVED CONSPIRACY BUT NOT THAT THE SUBSTANCE INTENDED TO BE IMPORTED WAS HEROIN

REGINA v. SAUNDERS - Supreme Court of Canada, 56 C.C.C. (3d) 220 - May 1990

The trial judge instructed the jury that if it found as a fact that the accused had conspired to import any prohibited substance under the Narcotic Control Act it could return a verdict of guilty even if they could not find beyond a reasonable doubt that the substance was heroin, as the indictment specified. The jury returned a verdict of guilty. The BC Court of Appeal ordered a new trial and the Crown appealed this order to the Supreme Court of Canada. The kernel of the appeal was whether that instruction to the jury was erroneous.

The Crown argued that the gravamen of the offence charged was the conspiracy to import a narcotic and not the importing of a specific narcotic. The Supreme Court of Canada responded that where the Crown decides to particularize the substance in the indictment it is obliged to prove the conspiracy was to import that specific narcotic. The information and the indictment are to give particulars to an accused person so he/she can prepare a full answer and defence to that criminal allegation. Allowing the Crown to allege one offence and prove one based on different particulars would undermine the right to receive details of the alleged crime. The court hastened to add that in cases like this, where the Crown is uncertain as to the particular drug or narcotic it may decline to give particulars of the substance. However, where, in an allegation of conspiracy, the Crown selects to particularize the substance it is obliged to prove it.

Crown's Appeal dismissed
Order for a new trial upheld

Note:

It seems reasonable to assume that the new trial must proceed on the exact same indictment as the original trial. However, the Crown may well be able to amend the indictment with the permission of the Court at the outset of the new trial.

It should also be noted that a month after this Saunders decision the Supreme Court of Canada pointed out that the errors in an indictment are not necessarily fatal to the prosecution. In G.B. - A.B. and C.S. vs. The Queen[5] it was alleged that these three youths sexually assaulted between two dates in December of 1985 a seven year old child. The evidence showed that the offence occurred one month earlier. The trial judge would not allow the indictment to be amended and consequently the youths were acquitted. The Supreme Court of Canada held that

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[5] 56 C.C.C. (3d) 200.

the place, victim and offence alleged were clearly identified. In such circumstances a conviction may result and the lack of the precise date of the alleged offence does not cause irreparable harm to an accused person. The defence had not been an alibi but a straight denial that the offence occurred. There are also indicators that this Saunders precedent only applies where conspiracy, rather than a substansive offence is alleged.

CHARTER "SPIN-OFF" BENEFITS

REGINA v. FRASER - 55 C.C.C. (3e) 551 - BC Court of Appeal, March 1990

The Crown adduced evidence before a jury that the accused and a Mr. B went to the home of her estranged husband and fired a shot through a window of his home. The curtains were drawn and one of the visitors in the husband's home was severely injured. The jury returned a verdict of aggravated assault and using a firearm while attempting to commit an indictable offence. The accused appealed these convictions.

Police interviewed Mr. B and he gave a very detailed statement of the events and took police to the spot where the rifle had been discarded. The accused's counsel claimed that Mr. B had been arbitrarily detained by police and that consequently all evidence obtained from him should be excluded.

The BC Court of Appeal had a number of cases supporting their view that only infringements under the Charter of the accused's rights could result in the remedy of exclusion. Section 24(1) clearly states that only the person whose right or freedoms have been infringed may apply for remedy. Section 24(2) says that only proceedings under subsection (1) may result in exclusion of evidence as a result of an infringement of a right or freedom. Consequently Mrs. Fraser, the accused, had no standing in this application for exclusion.

Another interesting issue arose in this appeal. Mr. B was called as a witness for the Crown, and was found to have a total loss of memory. It must be assumed that he was found to be an adverse witness as the Crown had been allowed to cross-examine Mr. B. The prosecutor made Mr. B read to the jury the detailed statement he had given the police. On each detail he was asked if it was true and fact. His answers were consistently, "I do not recall". Despite the fact that such cross-examination is only to attack the witness' credibility and not evidence to prove the truth of the content of the previous statement, one can imagine the impression this evidence made on the lay jury. It is difficult to believe that any instruction to that jury not to take any part of that statement into consideration to find facts, would suffice for that purpose. What was in issue was Mr. B's credibility and not his reading skills concluded the Court of Appeal. The Crown had given the impression that what Mr. B read out, was in fact his evidence. After all, his statement had amounted to a detailed eye witness account and the trial judge should have lessened the prejudicial affect of the Crown's cross-examination. The consequence of the Crown's method was a miscarriage of justice.

Appeal was allowed.
A new trial was ordered.

Note: The Court did say that the Crown had been entitled to cross-examine Mr. B but it should have been done in a different fashion. The prosecutor could have pointed out in general to Mr. B what he said in his statement and then asked him if this was true or if he acknowledged saying this to police.

What is somewhat puzzling in this case is whether Mr. B was an adverse witness. He simply claimed not to recollect and although this was unfavourable to the Crown who's witness he was, that claim is not necessarily inconsistent with the statement Mr. B made years ago. The Court's judgement does not deal with this issue. It must be assumed that the trial judge found having heard the witness during the *voir dire* to determine if he was adverse, that Mr. B was lying about his recollections. That is the only exception to allowing a witness to be cross examined by his own counsel without finding him adverse.[6]

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[6] McInroy and Rouse v. The Queen (1978), 42 C.C.C. (2d) 481.

"DOMESTIC MURDER"
SELF DEFENCE -- EXPERT TESTIMONY

Regina v. LAVALLEE - Supreme Court of Canada. May 1990, Canada - Supreme Court Reports - Volume I, 852.

Ms. Lavallee the accused and her common law husband Rust had a number of friends over. During this party an argument ensued between the 22 year old woman and Rust. She went to her bedroom and hid in the closet. Rust followed her shortly after in what she described in a rage. The guests could hear the yelling, screaming and thumping. Apparently Rust said to the accused, "Wait till everybody leaves, you'll get it then." He handed her a loaded rifle. Two shots were fired by the accused, one went through a door and the other hit the back of Rust's head as he was leaving the room. The accused was tried and the defence of self-defence was raised. The jury acquitted the accused and the Manitoba Court of Appeal allowed an appeal by the Crown and ordered a new trial. The accused appealed that decision to the Supreme Court of Canada.

The accused and Rust had lived together for approximately four years. During this time she took severe beatings from Rust. Records showed that injuries sustained required at least eight emergency treatments in hospital. The accused had told police after the shooting, ".... I was scared. I was so scared". When he (Rust) had given her the gun she was going to shoot herself. She sat on the edge of the bed and Rust, while shaking his index finger, had said, "You're my old lady and you do as you are told.....", "Wait till everybody leaves and you'll get it then", "....either you kill me or I'll get you." He had smiled and turned around. Then ..."I shot him....I thought I aimed above him and a piece of his head went that way."

A psychiatrist, who had spent four hours with the accused, testified for the defence. He told the Court that he considered the accused to be credible and consequently he believed her version of events. He related what the accused had told him and concluded with the expert opinion, that the shooting had been a "last straw" act. The accused had sincerely believed that Rust would kill her after everyone was gone and her actions were "a reflection of her catastrophic fear". Shooting Rust had been the only way to preserve her own life. All this evidence was before the jury via the defence psychiatrist. <u>The accused did not testify</u>.

The two issues before the Supreme Court of Canada was the back door approach by the defence to present the accused's version of events to the jury and whether in the circumstances the defence of self-defence is available.

An expert witness who offers an opinion in testimony is permitted to give in evidence those things upon which he/she bases that opinion. Such evidence is admissible exclusively for the purpose of supporting the opinion and not as proof of facts. A jury must be very carefully instructed on this point and in this case the trial judge had done so. The Crown seemed to have

argued that the jury could not have heeded that instruction. If the defence of "self-defence" was available there was no evidence other than the psychiatrist's testimony with regard to what occurred in that bedroom. Only the accused and Rust were present at the time of the shooting and the accused's version of what happened was presented by the expert. This the jury could not use to find facts and yet they returned a verdict of acquittal. Also the matter of credibility on the part of the accused was before the jury as an opinion of the psychiatrist. This was second hand evidence and inadequate to show her voracity. Although the accused did, of course, not have to testify, in these circumstances that was the only means of adducing evidence as a prerequisite to consideration for self defence and to show credibility for such evidence to be believed. The doctor's evidence supporting his expert opinion was admissible. It was not admissible for the inferred purpose for which the jury used it.

It was conceded that the accused shot and killed Rust. But, the defence claimed the accused had a lawful excuse for doing so. The excuse is one provided by statute for the purpose of negating the criminal liability. The relevant portion of s. 34 C.C. states that every one who is unlawfully assaulted and causes death in repelling the assault is excused if he believes on reasonable and probable grounds that he cannot otherwise preserve himself from death or grievous bodily harm. The Crown claimed that even if the circumstances were as the expert doctor believed, the accused had no excuse as provided by this self defence legislation. She may well have believed Rust would take her life later after everybody was gone. However, the Canadian theory of self defence is that the grievous bodily harm or death when unlawfully assaulted is immediate and imminent. It does not apply until the victim has retreated as far as possible to prevent these consequences. In this case the accused believed that Rust would take her life or cause her bodily harm, but not immediately. As a matter of fact he was in the process of leaving the room and his threats were clearly referring to something he would do later. There was opportunity for her to retreat and seek protection from either the guests, neighbours or police. She had acted on what she believed would happen at some future point in time. If we were allowed to take the life of persons who threaten us with bodily harm, death, or we believe will or are capable of carrying it out, our society could become quite chaotic in this regard. If death of an alleged aggressor was caused, fabrication and concoction of threats uttered in private are capable of being excused for what is in essence murder. What aggravated this matter in this case, is that the evidence of such a threat was adduced by the defence through the back door so to speak, without an opportunity for the jury to assess the credibility of the accused. The evidence of credibility in this case was no more than the opinion of a defence witness which by the law of evidence could only serve as a basis for him to rely on the information the accused gave him for the purpose of forming an expert opinion in her favour.

In the final analysis, the only evidence before the Court of threat, fear and belief of bodily harm or death (not necessarily credibility) was by means of the statement of the accused to police. It, no doubt, could serve as evidence of the truth of its content. But even if this did suffice to show that what she said was fact, it fell short of making the defence of self-defence available to her for reasons stated above.

The Supreme Court of Canada, through Madame Justice Wilson's reasons, addressed itself to the battered wife syndrome and held that the expert testimony is admissible to assist the fact-finders (the jury) in drawing inferences from the relevant expert testimony which is beyond the knowledge and experience of that of the lay person in this field. The direction the trial judge had given the jury were held to be adequate. In addition the expert testimony relating to the ability of the accused to perceive danger may go to the issue whether she reasonably apprehended death at the hand of her partner. Also it may serve as an explanation why the accused did not flee (retreat) and the reasonableness of the belief that killing her assailant was the only way to save her life. The expert defence evidence had been properly admitted for the jury to determine if the accused had an apprehension of death and did believe not to have an alternative to shoot as she did. The facts presented by the expert need not be proven in evidence before any weight could be given to it. However, the weight of such expert evidence not proven is proportionate to the weight a jury may attribute to the expert's opinion. Needless to say that this may open wide the back door to present unsubstantiated defence evidence where before this door was shut.

Considering the instructions to the jury and its verdict, it must have concluded that the accused's actions were justified in the circumstances to repel the assault (despite the fact that the assault had ended when the fatal shot was fired) and that the accused had on reasonable and probable grounds the belief that this was the only means to preserve her life.

The accused's appeal was allowed.
Acquittal was restored

Comment:

Madam Justice Bertha Wilson authored the Court's judgement that does in my respectful opinion create bad law and a legal luxury we simply cannot afford. This despite my sincere empathy for the accused (if the facts were as she related them) and my deep feelings of repulsion for the likes of those as Rust was depicted in this case. Impulsively and emotionally I am inclined to conclude that Rust deserved what he got and the accused's action was justified. Nonetheless the law must, of necessity, be applied unemotionally and detached. In this case it appears that it was not so applied and consequently this Supreme Court of Canada decision may cause a quantum change to the issue of self-defence. A defence now positively available not only to battered women but also to the vengeful in all forms of relationships including those in the criminal element. If the object is to minimize violence it may well have the opposite effect.

As mentioned above these reasons for judgment deal extensively with the battered wife syndrome. An effort is made to distinguish self defence in the spousal setting from that in other encounters or relationships as a good portion of the judgment describes the social problem of the oppressed women in domestic settings. It relates the obsolete notion that a man has the right

to discipline his wife and that she is duty bound to serve and obey her husband until death does them part. Although this may socially be obsolete and considered orthodox unacceptable, it is not so reflected in police and charging policies said the court. For many battered women the suggestion that she is free to leave the relationship is a myth. The Court also made the distinction that in a man/wife relationship the wife is, from experience and patterns of behaviour on the part of her batterer, aware of the inevitable consequences of anything that may arouse her spouse's wrath.

The Court in essence concluded that to hold that self defence is in such settings restricted to situations of the aimed firearm or raised knife[7] before she is justified in repelling her assailant by incapacitating or killing him is unreasonable. It would amount to subjecting her to grievous bodily harm or death by instalment. She, unlike in other situations, is aware of the cumulative effect that trigger acts of violence on the part of the man. In other words, the predictability of violence and its degree is nearly flawless due to long periods of being subjected to brutality. What aggravates the propriety of applying the doctrine of opportunity to flee or retreat before the justification to repel violence is the manifestation of reluctance to disclose to others the existence of violence in the institution of marriage or akin relationship. As in this case, the hospital records show that the cause of injuries were camouflaged out of such reluctance or intimidation to reveal the true causation.

For all these reasons (and more), the Court seems to say that separate consideration must be given to claims of self defence by the battered wife.

Despite my tendency to welcome and praise this apparent remedy to the pressing and real grievance of the battered wife, I do not believe that this judgement is adequate to create a precedent exclusively applicable to battered women. In other words to make it distinguishable from other situations where a person regardless of gender, has due to the known propensities of others a cumulative perception of violence equal to that of a battered woman. Or, where due to intimidation and consequential fear, a person cannot discontinue his/her relationship (other than one akin to husband/wife) with an oppressor or batterer.

Madame Justice Wilson has shown in this case as well as in *Clarkson v. The Queen*[8] a commendable empathy for women and their realistic disadvantages in violent marital or like settings. However, it seems to me, despite my deference and respect for this Justice, that in Clarkson, police investigative behaviour was excessively criticized, resulting in a finding that her right to counsel had been infringed. This effectively excluded from evidence her volunteered confession that she had killed her husband. In this Lavallee case (should I have understood it properly) the precedent is for one discriminatory and for another it seems an inappropriate means of remedying an aspect of a social malady.

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[7] R. v. Whynot (1983) 9 C.C.C. 449.

[8] Volume 24, page 33 of this publication (April 86)

Even though the case load of the Supreme Court of Canada seems substantial some Justices of that Court advocate an increased and radical exposure of the judiciary in the public forum. The dictum that the appointed makers of common law should not speak until spoken to in disputes before them and then only in regard to the narrow relevant legal issues raised in disputes over which they preside is according to Mr. Justice Sopinke outdated. He expressed the opinion in a speech to the University of Windsor law students that judges should be free to comment publicly about their decisions and the Court system. He included in the topics they ought to be able to comment on, political issues and law reform. He could see no reason for the continuation of the "self imposed" rule that those who exercise judicial power (one of the three powers by which we are governed) must publicly (while off the bench) remain silent. Madame Justice Wilson seems of the same opinion as she took a relaxed approach to this dictum when speaking to Osgoode Hall Law School students. Her comments were in regard to womens issues and she claimed that gender bias was firmly entrenched in the law practised from the benches of our Courts. This, no doubt, sheds light on some of the rulings she authored for our highest court.

If the dictum about our judges is self-imposed there appears to have been a weighty reason for it. Also by means of statute has our system of government attempted to separate those who make up the check and balance system of our governmental structure from the political arena. One excessive measure to accomplish this has recently been repealed. Judges are now allowed to vote.

It is a justified concern that our judiciary have an inordinate amount of power in a our Canadian system of government. The entrenchment of our constitution has added considerably to that power as the interpretation and application of that Supreme law is nearly exclusively within their purview. Furthermore the personal opinions of our judges, if publicly expressed would severely affect the essential appearance of impartiality. It would nearly invalidate their precedents, and disqualify a judge in the layman's view when the issues in the dispute over
which he/she presides touches on matters on which he/she has expressed to have a personal bias or bent. Furthermore it seems fair that the practice of judicial public comment permits a proportionate relaxation in regards to contempt of Court. It then follows that the politicians and the public also gains the right to severely criticise and lambast individual judges for his/her performance and decisions.

The Clarkson and Lavallee cases have already prompted public comments that they reflected and were influenced by the personal bent Madame Justice Wilson expressed in her speech on women issues. Relaxation of these doctrines will simply cause a quantum change in the image of our Courts and indeed may bring the administration of justice into disrepute. It seems fair to say that our Courts already have a dubious reputation in the minds of the layman as an effective institution to impart justice. At least, in relation to the common perception of justice. For one, it is no longer seen as a fact finding entity but a place where apparent irrelevant and far fetched legalities are debated with an emphasis on semantics. The chances that the guilty are punished or that the facts will be considered, are due to evidentiary and (to them) mysterious technical obstacles, considered to be slim.

This case has received considerable comment and most reactions are critical. The legitimate grievance of abused women in our society is desperately in need of remedy. The "industry" of violence has consequences in all aspects of our society. Regrettably the defenceless are predominantly the targets and victims. Whenever a problem like this manifests itself, legislation or legal precedents are the popular means of deterring such unacceptable behaviour. However, law is rarely the singular remedy to sociological problems. Violence against women is a prime example that not only the lawmakers including our Courts, must wage war against those who commit such repugnant acts, but the nation must do so as a whole.

Such behaviour must visibly be unacceptable in our society and women who are literally trapped in relationships of any kind in which they are abused, must receive assistance to distance themselves and their children from such situations. We have very sophisticated definitions for custody or detention. Many women who appear to have freedom of movement are psychologically and socially detained with no means to escape very intimidating environments. Killing the potential perpetrators may in some cases be tempting and in terms of retaliation be satisfying. It needs no comment that this is hardly the answer. Furthermore, broadening the defence of self defence affects relationships unrelated to the gender issue. In a civilized society this we can ill afford.

POLICE INVESTIGATING B & E: SUSPECT EXPECTED TO BE STILL IN VICINITY OF CRIME SCENE: QUESTIONING A PERSON WHO SUBSEQUENTLY BECOMES A SUSPECT: WHEN DOES INVESTIGATIVE PROCESS CAUSE DETENTION?

REGINA v. LAWRENCE - 59 C.C.C. (3d) 55, Ontario Court of Appeal, August 1990

Police received a report that a B & E had occurred "next door" a few minutes ago. A description of the suspect was given and police searched the neighbourhood. Although the description given was that the suspect was a teenaged male, an officer decided to stop the accused, a 26 year old female, he found riding a bicycle on the side walk. The clothing of the reported suspect was different from that worn by the accused, but not completely dissimilar. The officer had blocked, with his cruiser, a street that intersected with the street the accused was on so her straight passage was obstructed although there was room for her to go around the police car if she had wanted to. The officer asked if he could speak to her. The address she claimed to live at was believed to be wrong and this led him to ask what was in her knapsack. She gave the satchel to him for his inspection. He found a screwdriver and a large quantity of chewing gum. It was learned that gum, money, and a flashlight were missing from the house broken into. After speaking to the accused for nearly a half hour the officer asked the accused to get into his police car. Five minutes after that he arrested her and informed her of her right to counsel. At the police station money was found in the lining of the accused's coat and a flashlight was found stashed in the police car. An interview of the accused resulted in very reluctant responses. She was convicted by a jury of breaking, entering and theft and in Provincial Court for possession of a stolen hunting knife that had also been found in her knapsack. She appealed these convictions claiming that she was detained from the time the officer stopped her and that her right to counsel had been infringed. This, she claimed made all evidence obtained inadmissible.

Needless to say that this situation is, in law, distinct from where a person is stopped and demanded to give samples of his/her breath. The essential test to determine if the accused was detained is whether the officer had "assumed control over the movements of the accused by a demand or direction that might have significant legal consequences" for the accused. Had the police when they questioned the accused initially already decided that she was the perpetrator of the crime under investigation? Did the officer who stopped her have reasonable and probable grounds to believe the accused had committed the crime? Was the nature of the questioning designed to confront the accused with evidence that she had committed the crime and to obtain information from her? Did the accused at the time believe that she was detained?

The officer had asked the accused if he could talk to her. His wording had not amounted to a demand or direction and if she had refused no legal consequences could follow from that refusal. At that point, (when he asked to speak to her) the officer had no reasonable and probable grounds to believe she had committed the break and enter offence. There had been nothing

suspicious about her cycling along and the description of the reported suspect did not fit her. In other words the above test failed and the answer to all of the crucial questions mentioned above was "no". Police had not crossed the thin line between legitimate police investigation and improper detention. If the officer would have effected an arrest in the first instance it would have to be on reasonable and probable grounds.

He could not have arrested her for refusing to talk to him. Therefore, the accused was not under any demand or direction from the officer and consequently she was not detained until he directed her to get in the police car. She was then appropriately informed of her right to counsel. Until then his questions were part of a general and *bona fide* investigation. In the circumstances, said the Court, the officer

> "..... would probably have been considered at least naive, if not negligent, if he had not tried to ask her some questions. That was his duty: to investigate a reported offence and, to this end, to try to ask questions of anyone who might seem to be a possible source of such information. However, if a police officer who questions a person who might appear suspicious must always provide s. 10 (b) warnings, there would be far more detentions and arrests than our society would tolerate".

In relation to blocking the accused's path with the police car the Court said that it had started to take on aspects of a physical detention. But detention involves either a physical or psychological restraint from leaving. Here there was only some physical inconvenience. She could have gone around the cruiser if she had wanted to.

There had not been an unreasonable search either, held the Court. The accused was asked what was in the knapsack; she in response offered it to the officer for him to see for himself. She had not been under any direction to allow the search. Her actions were not only voluntary; she in fact volunteered that the knapsack be searched. Consequently the search was not unreasonable.

The Court concluded that the accused was not detained until she was directed to sit in the police car. There was no reason to exclude any of the evidence.

The accused had been separately tried for possession of a stolen hunting knife. She had offered an explanation for the possession and said she had been given the knife just before her arrest, by a fellow who boarded at the same place she did. He had told her that he had been given the knife a couple of years ago. The owner identified the knife and testified that the accused was found in possession of his property only a few days after it was stolen from him. The Crown appeared to have relied on the "rule of evidence" that provides for the "drawing of an inference" that the person who is found in unexplained possession of goods recently obtained by means of a indictable offence has knowledge that they were so obtained or committed the crime by means

of which they were obtained.[9] (No longer known as the "doctrine" or "principle" of "Recent Possession").

The defence argued that the Crown could not benefit from this rule of evidence as the accused had explained her possession. The trial judge may not have been satisfied that the explanation could reasonably be true. In other words reasonableness is synonymous with believability. The explanation (to be given contemporaneously with being found in possession or by means of personal testimony) must be capable of belief. In this case the owner conceded that the knife could have been missing from his glove compartment for "some time" before he discovered it missing, although that period was short and a matter of four days at the most. The explanation the accused gave was personal testimony that the knife was given to her the night of her arrest by an identified fellow boarder was capable of belief, the defence argued, "The boarder obviously lied to her about the origin of the knife", suggested the defence. This explanation might reasonably be true, although the Court may not be satisfied that it is true. However, in view of this explanation the rule of evidence known as "Recent possession" did not apply, defence counsel argued.

The trial judge had held:

> "....this accused person misled the police in almost every way by straight lies or not answering questions as they were asked".....
>
> "....in all the evidence, I do not accept the accused's version of what happened".

The Ontario Court of Appeal declined to interfere with this finding. Consequently the possession was unexplained and "Recent Possession" applied.

Accused's appeals dismissed.

Note: It seems that for the defence to show "capability of belief" is a lesser threshold than showing on the balance of probabilities that an explanation is true. The trial judge held in essence that the credibility of the accused was such that he could not accept (believe) the accused's version of the events surrounding her possession of the stolen hunting knife. That seems an application of the test whether or not she was believed rather than the lesser stringent test whether her version could

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[9] Supreme Court of Canada (September 1988) in Kowlyk v. The Queen. See Volume 33, page 15 of this publication. Also 43 C.C.C. (3d) 1.

be true. The Ontario Court of Appeal held that the trial judge had correctly concluded that the explanation "could not reasonably be true" and saw no error in this. A careful reading of the Supreme Court of Canada decision in Kowlyk may leave one some doubt if this is a proper application of the definition of "Recent Possession".

FOUR YEAR OLD CHILD'S DECLARATION THAT SHE WAS SEXUALLY ASSAULTED. ADMISSIBILITY OF DECLARATION AND THE CHILD'S TESTIMONY

REGINA v. KAHN - 59 C.C.C. (3d) 92, Supreme Court of Canada. September 1990.

Mrs. O attended the doctor's office with her four year old daughter. The doctor first examined the girl and took her into his private office while the mother readied herself for her examination. On the way home the mother inquired what the doctor had said to her. She related how the doctor had asked if she wanted a candy ....." And do you know what?....He said open your mouth.....He put his "birdie" in my mouth, shook it and peed in my mouth.....and he never gave me my candy."

The accused was acquitted of sexual assault by the trial judge but the Court of Appeal ordered a new trial. The accused appealed this decision to the Supreme Court of Canada.

The evidence the Crown had adduced included testimony by the mother; the unsworn testimony of the child; and forensic evidence that a wet spot on the girl's sleeve was semen. The trial judge held that the mother's evidence was inadmissible as the statement the girl made to her was "not contemporaneous with the event" and therefore not an exception to the hearsay rule. He also held that the child was incompetent to give unsworn evidence. This left the Crown with, to say the least, inadequate evidence to prove the allegation against the doctor.

The four year old girl clearly could not be sworn as she failed to understand the significance of testifying in a court. However, when she was examined to determine if she could give unsworn testimony she was asked if he knew what it is to tell a lie. The girl gave an example and said, "If you say you cleaned up your room and you didn't....that's a lie". When asked what happens when you tell a lie she answered that your parents "spank your bum". Despite these answers the trial judge had found the girl too immature on account of her age. The Supreme Court of Canada held that the trial judge had erred. Section 16 of the Canada Evidence Act makes no distinction between children of ages who cannot be sworn. The judge had found the girl to be of sufficient intelligence and she clearly had shown to understand the duty to tell the truth. These are the only two requirements under s. 16 to accept the unsworn evidence of a child. If the age was a determinative factor "there would be danger that offences against very young children could never be prosecuted" said the Supreme Court of Canada.

In regard to the mother's hearsay evidence the Supreme Court of Canada agreed that the statement the girl made to her mother could not meet the "traditional" tests for spontaneous declarations. The statement was made some 30 minutes or more after the alleged assault and about 15 minutes after they left the doctor's office. The traditional application of the exceptions to the absolute hearsay rule created certainty to the law of hearsay "but has frequently proved unduly inflexible" in dealing with the new situations and needs in the law. Consequently there

have been sensible improvements in this regard to arrive at the truth in cases (1) where it is difficult to obtain other evidence; (2) where the person who made the declaration is disinterested in that it was not made in favour of his/her interest where it was made prior to the commencement of a dispute or litigation and consequently without bias; and (3) where the declarant has a peculiar means of knowledge not possessed in ordinary cases. This makes the main two general requirements, necessity and reliability for a court to apply a more flexible approach and accept the evidence of a declaration despite the fact that it does not meet the strict exceptions to the hearsay rule. In this case the child was disinterested and did not make the statement in favour of her interest. She made it prior to the commencement of litigation and she had peculiar knowledge which she made her mother aware of. Her statement in this case meets the requirements of necessity and reliability. In regard to the latter requirement the judge who receives the evidence must, based on circumstances, demeanour and personality, determine the reliability of the declaration.

The evidence of the mother and the child may be admissible and should not have been rejected for the reasons the trial judge gave.

The accused's appeal was dismissed
A new trial was ordered

IS INTOXICATION A DEFENCE TO IMPAIRED CARE AND CONTROL OF A MOTOR VEHICLE?

PENNO v. THE QUEEN - Supreme Court of Canada - October 1990

A criminal offence usually has two essential elements: *Actus Reus* (the wrongful act) and *Mens Rea* (criminal intent). *Actus Reus* includes voluntariness. When a person is so inebriated from voluntary intake of alcohol that he does not even has a recall of what he did, it seems contrary to the principles of law to conclude that he voluntarily committed the wrongful act or that he formed a criminal intent.

Criminal offences are sub-divided into two categories: those requiring a specific intent and those only requiring a general intent. Offences requiring a specific intent are those which by their definition or necessity are committed by a means which is an offence by itself. Murder is a prime example of a specific intent offence. In general voluntary intoxication is no defence to general intent offences but is capable of a person charged with a specific intent offence to be convicted of a lesser offence or the one by means of which he attempted or did commit the specific intent offence.

The accused in this case was admittedly inebriated when he was in care and control of a motor vehicle and backed it up for a short distance. He was so drunk that he could not remember anything of the event itself or anything else that happened that evening. Yet he was convicted of impaired care and control of a motor vehicle. His plight that his state of intoxication deprived him of forming any intent or voluntariness to do what he did, reached the Supreme Court of Canada.

The defence argued that the offence of impaired care and control is one that requires specific intent and that the defence of intoxication was available to the accused. However, if the Court should find that the offence is one requiring general intent only, then the unavailability of the defence of intoxication violates the right not to be deprived of liberty and security of the person except in accordance with the principles of fundamental justice and the right to be presumed innocent until proven guilty (s. 7 and 11(d) of the Charter respectively).

The Crown did not rely on the statutory presumption of care and control but relied exclusively on evidence that the accused exercised care and control.

The Supreme Court of Canada gave lengthy reasons for judgment but in short held that the offence alleged is one of general intent and that impairment, an essential element of the offence, cannot serve as a defence. It concluded that the *Mens Rea* of the offence lies not in the intention to assume care and control of a motor vehicle, but in voluntarily becoming intoxicated.

Appeal dismissed
Conviction upheld

ENTRAPMENT BY CIVILIAN UNDERCOVER AGENT

THE QUEEN and WHELLIHAN - Supreme Court of BC - Vancouver CC891643, July 1990

B was a civilian undercover agent involved in a police investigation known as "Operation Deception". The specific target was drug and narcotic offences in a certain community. B used to live in that community and returned to it in 1987. He renewed his friendship with the accused; a friendship that became intense and extensive in that it included the accused's family.

B pretended that his goal was to become the principal dealer of marijuana in the local marina. Although the accused was not buying any drugs or narcotics for himself or others he was asked by B to keep his eyes open for any contacts, especially to gain a supply source for him. The accused told B that he knew from friends where marijuana could be purchased. As a result B arranged a meeting between the accused and Constable K. The constable asked the accused if he had marijuana for him. The accused replied that he knew where to get it and that his source was willing to supply him as a favour. The accused returned some time later and sold some marijuana to Constable K. Consequently the accused was charged with trafficking in marijuana.

B testified but failed to impress the Court in regard to his voracity. He obviously misled the Court in several pertinent areas and the Court seemed under the impression that B had also misled Constable K.

Defence counsel argued that in case the Court was to find the accused guilty, a stay of proceedings should be ordered as the process of the Court had been abused on account of entrapment.

The police knew that drug and narcotics were sold in that community and they were entitled to create opportunities for people to commit such offences. However, the conduct of police and their agents must not go beyond this. Inducements to commit such offences amount to entrapment.

The Court held that B (not Constable K) had importuned his friend to help him in establishing himself in the marijuana trade. The accused had been a credible witness and the Court found that had it not been for B's persistence, the accused would not have been involved in this transaction.

No *mala fides* were found on the part of Constable K, but the same could not be said for his agent B. The accused had shown on the preponderance of evidence that he had been entrapped and was entitled to a stay of proceedings against him. The accused was found to have committed the offence alleged against him but due to entrapment a .....

Judicial stay of proceedings was ordered

SOLICITING
NO INTENTION TO OBTAIN SEXUAL SERVICES

LOOF & KELLY and THE QUEEN - Supreme Court of BC, Victoria No. 52391, October 1990.

One can show interest in merchandise without any interest to make a purchase. The two accused made a similar claim in relation to sexual services prostitutes offered. They said not to have had any intention of purchasing sexual services. When they spoke to two undercover policewomen they were merely interested in what kind of services were offered for what price and by whom. They were simply on, "a hooker run". Even if their inquiries may have been explicit and may have given the impression to the "hookers" they talked to that they were seeking sexual services, "neither of these two individuals intended to carry through with the act". Their sole purpose was to have some fun and engage in conversation with prostitutes. Consequently they did not commit an offence, argued defence counsel. To support this evidence was adduced that the accused had no money on their person to purchase any services. Furthermore, they had taken a break from a party at a nightclub where they were expected to return shortly after they left.

The trial judge had found that the offence section does not contemplate that sexual services be obtained but the communication intended to obtain them. Consequently, the fact that the accused had no money on them was not fatal to what the Crown attempted to allege. Neither did the trial judge put too much in the time constraints of the accused. He found that they had communicated with the undercover officers for the purpose of obtaining sexual services. The accused were convicted and appealed to the Supreme Court.

The Justice of the Supreme Court held that it was a simple case where the trial judge had rejected the defence evidence in respect to the claimed innocent purpose of the accused communications.

Convictions Upheld

BLOOD SAMPLE TAKEN FOR MEDICAL PURPOSES SEIZED FROM A HOSPITAL BY MEANS OF A SEARCH WARRANT - ADMISSIBILITY OF ANALYSIS

REGINA v. LUNN - B.C. Court of Appeal - CA V01104, Victoria Registry - December 1990

After drinking some beer at home the accused and his wife went to a pub where he was "cut off" due to staggering all over the place and falling down on the dance floor. He drove to a service station where he again staggered around, fell down and was abusive. The attendant phoned police and reported the direction the accused took when he drove onto the highway. When rounding a curve too widely the accused sideswiped an oncoming car and crashed into a rock. His wife died instantly and it took two hours to extricate the accused from his van.

Although the accused refused to give voluntarily a sample of blood for the purpose of determining his blood-alcohol content a sample was taken for medical purposes. Six days after the accident police seized that blood sample by means of a search warrant. The warrant was issued upon an extensive and elaborate information. Analysis of this sample showed that the accused's alcohol content was .23 some four hours after the accident. Evidence by an expert suggested that at the time of driving that content was .33. A jury convicted the accused of criminal negligence causing death and impaired driving causing death. He appealed these convictions claiming that the blood sample and its analysis were inadmissible in evidence due to the admission having constituted the trial to have been unfair, this constituted a breach of the Charter right to such a trial.

Defence counsel took the position that the officer could have made a demand for a sample of blood within the two hour period from driving. That sample would have been taken in these circumstances outside the two hour period and the Crown could not have relied on the presumption that the blood-alcohol content at the time the sample was taken was the same as that at the time of driving. By means of expert evidence it could have shown what the latter content level was. He argued that the investigating officer's misconception of the law had caused the Crown to use a blood sample that was taken for the accused's medical benefit. Admitting in evidence that sample and its analysis had rendered the trial unfair. In other words, there is a specific legislative provision for police to obtain a blood sample. Not having used that provision and instead obtaining the sample by different means is an impropriety, defence counsel submitted. He stopped short of saying that the only means by which police can obtain a bloodsample for the purpose of a criminal prosecution is by demand [s. 254 (3)]. The BC Court of Appeal responded that the officer's way of proceeding, despite his mistaken view of the law, did not make the blood sample obtained for medical purposes inadmissible in evidence.

The investigating officer had phoned the pathologist at the hospital and had requested him not to dispose of the bloodsample. He told the doctor that he intended to apply for a search warrant so he could use the sample as evidence. The doctor agreed and that, argued the defence made

the doctor an agent of the State who by complying with the request, had invaded the accused's reasonable expectation of privacy which amounted to a breach of the Charter.

Evidence showed that by hospital policy all blood samples are retained for seven days. Consequently the doctor did not accommodate the seizing of the blood. He did nothing more than comply with hospital policy and answered in the affirmative when asked if the hospital still possessed the accused's blood sample. Throughout, he was an employee of the hospital and not an agent of the State. As such the Charter did not apply to him (see s. 32 (1) Charter). There was nothing wrong in the officer making the inquiries of the doctor, consequently there was no Charter breach and the evidence of the blood sample was properly admissible at trial.

Appeal dismissed
Convictions upheld

SUSPICIOUS BEHAVIOUR - REASONABLE AND PROBABLE GROUNDS TO EFFECT AN ARREST

REGINA v. HALL - BC Supreme Court - Kamloops 36150, July 1990

The accused, a person known to associate with drug traffickers, and who has been charged with drug offences which resulted in stays of proceedings, was seen to make a fifteen minute visit in a house in an area under surveillance for drug offences. This residence had been investigated recently for drug related activities. The officer who observed the visit decided to follow the accused's car but lost it. He alerted other units and the accused was sighted shortly after. The accused suddenly made a U-turn across the side walk. This manoeuvre was recognized as a "heat check" on the part of the accused to see if he was being followed. He was stopped and arrested. He resisted the arresting officer and was accordingly convicted.

The reasons for judgment do not give any details what the accused was arrested for or how he resisted the officer. The issue in the accused's appeal from conviction was whether the officer was in the lawful performance of his duty; did he have the reasonable and probable grounds to effect an arrest.

The trial judge had held that the circumstances did suffice to give the officer the grounds to effect the arrest. The accused had a reputation as someone involved in illicit drugs; he had attended a residence in the suspected area; the short duration of that attendance; his driving conduct including his "heat check".

The Supreme Court disagreed and held that the trial judge had applied a subjective test while the grounds for an arrest must also be justifiable from an objective view. The Court hastened to add that this does not mean that the officer was required to establish a *Prima Facie* case for a conviction before making an arrest.

Does a person who has been charged before with drug offences but was never convicted by reason of a stay of proceedings or acquittal have a bad reputation? Although that does not support a good reputation, conversely it cannot be said that it establishes a bad reputation.

The information in the hands and mind of the officer was "scanty" and it was an error on the part of the trial judge that the vital objective test had been met.

Appeal allowed
Conviction set aside and acquittal substituted

VIDEO TAPED INTERVIEW SHOWING THAT INDUCEMENTS HAD NO AFFECT ON ACCUSED AND DID CONSEQUENTLY NOT AFFECT VOLUNTARINESS

REGINA v. THOM - BC Court of Appeal - Vancouver No. CA 011523, October 1990

The complainant of a sexual assault had been to a party and consumed a substantial amount of alcohol. When on the street she was offered a ride by the three male occupants of a car. She accepted because she thought these men had been at the party also. When she wanted to get out and walk home she was thrown in some bushes. Her underwear was ripped off and she was hit in the face when she screamed. One of the men held her down and when the "husky" man had kneeled between her legs and reached to unzip his pants, a voice said, "What's happening". This was a person who lived nearby and had heard the screaming. The men then fled. The complainant identified the accused as the "husky" man who had done this to her. This identification took place at the preliminary inquiry. The accused was convicted and appealed the conviction.

An interview of the accused was videotaped and the tape was adduced in evidence. The officer told the accused that he had been identified from a photograph and that his fingerprint had been found in the car. This was misleading as this was not so. The accused had testified that he had made the statement as he believed the officer. Yet, the trial judge had admitted the statement. She had viewed the tape and observed how comfortable and relaxed the officer and accused were, the latter sipping coffee and smoking a cigarette. Both men exhibited bravado and the accused showed surprise when at the end of the interview he was told that his detention was to be continued for further investigation. This bravado had also been apparent in the dialogue. The officer had said that if a rape took place, that was serious and he would do his utmost to see the accused prosecuted. However, he thought it of equal importance to know if the complainant was "nuts", a "douche-bag", a "drunk" or was "knocked up" and needed an excuse. The accused responded that the girl was "fuckin' crazy". When getting into the facts the officer inquired, "Where did you meet this broad?" The accused's version of things was exculpatory and he had been willing to tell that version in response to the suggestion that he would not be charged if he gave a plausible explanation. The defence suggested that what was said to the accused was in essence, "You give me a statement and you won't be charged". This was rejected by the trial judge.

In the Court of Appeal it was argued that the statement was not voluntary and hence inadmissible. The officer had induced the statement said defence counsel. He had thanked the accused for "coming down today" and minimized the seriousness of the allegation by referring to it as "a bit of a hassle". He supplied the accused with coffee and cigarettes, lied to him in regards to having been identified and that his fingerprints were found in the car. He also regaled the accused with macho and man-to-man theories on why the complainant may have

lodged a false complaint. And, no doubt, the officer implied that if a plausible explanation was given there was a possibility that no charges would be suggested to the Crown. The statement that followed was inculpatory although it was an admission rather than a confession.

Crown counsel argued, that if the statement had been adduced by means of transcript only, the defence submissions may well have to succeed. However, the trial judge (as did the Justices of the Court of Appeal) were also exposed to the accused's physical reactions to what the officer told him and the trial judge had held as a fact, that the accused's demeanour and deportment had clearly shown that the alleged inducements had no specific effects on the accused. Therefore, they had not affected the voluntariness of the statement. The Court of Appeal declined to interfere with that finding and upheld the conclusion that the statement was admissible.

Accused's appeal dismissed
Conviction was upheld

NOT RESTORING PAYMENT MADE BY MISTAKE
DOES RECIPIENT COMMIT THEFT OR ANY OFFENCE KNOWN TO LAW?

REGINA v. MILNE - 59 C.C.C. (3d) 372, Alberta Court of Appeal - October 1990.

The accused owned and operated a company known as "National". He had the signing authority in regard to contracts and withdrawals from the Company's bank account. For the purpose of this case the accused and the company were one. "National" provided a service to the Hudson Bay Co. for the sum of nearly $17,000.00 and received payment in full for that service. By some administrative mistake the H.B.C. did forward another cheque to "National" for the same amount. The accused, fully aware of the mistake cashed the cheque and deposited the amount in "National's" bank account. The accused then cleaned out "National's" account (including the H.B.C. funds) by certifying cheques payable to himself and cashing them. Consequently he was convicted of theft from H.B.C. by converting the $17,000.00 to his own use. The accused appealed in essence claiming that what he did does not amount to theft or to any offence known to law.

The criminal offences by which a victim is deprived of property are basically divided into two categories. These are distinct from one another relative to the victim's role in parting with the property. If he/she is induced to part with the property by falsehood, deceit or false pretence the act of the cheater is theft by trick. If the perpetrator simply takes the property without the owner's consent the offence is straight theft. In neither case is there a "transfer of property", as the property only changes possessor but not owner. Where there is in law a "transfer of property" the means may amount to a tort but not theft or theft by trick.

The accused in this case submitted to the Alberta Court of Appeal that there had been a transfer of property in relation to the second cheque. Canadian law simply has no provision for an offence in criminal law for not restoring payments made by mistake. Two of the three justices agreed with the accused.

The Court hastened to add that there are mistakes where property does not pass and where diverting the windfall to one's own use does amount to theft. Examples are where the bank intends money to be put in the account of Jones but by mistake places in the account of Smith. No one intended to pay Smith or an envelope of money is placed in the wrong mailbox. The money was not intended for the person whose mailbox it was placed in or two crisp new banknotes stick together and the payer does not realize that he is handing over two instead of the one bill he intended to transfer to the receiver.

H.B.C. intended to issue a cheque to the accused's company, for it to receive the cheque, cash it and possess the proceeds. The company did so. H.B.C. did not confuse payees or property. In other words, H.B.C. succeeded to accomplish what it set out to do. By having overlooked the fact that it had no obligation to do so, it gained a civil cause of action for a like sum but lost property in the cheque and its proceeds.

Accused's appeal allowed
Conviction for theft set aside
and acquittal substituted

Note: This was a majority judgement. One justice dissented. He strongly felt that the accused knew of the error and he subsequently diverted the proceeds of that error to his own use. He would not have allowed the accused's appeal.

"SUSPECTED" IMPAIRED DRIVER NOT COOPERATING WITH POLICE BEYOND LEGAL REQUIREMENT - REASONABLE AND PROBABLE GROUNDS TO DEMAND BREATH SAMPLES

REGINA v. ANDREE - BC Supreme Court - Vancouver C.C. 900114 - August 1990.

The accused appealed his convictions for driving while impaired and for refusing to give a sample of his breath. The causes for appeal were dominated by the question whether police had the reasonable and probable grounds for demanding samples of breath from the accused.

The definition of those grounds is as follows:

> "Reasonable and probable cause is an honest belief in the guilt of the accused, based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probable guilty of the crime imputed."

In terms of the facts the Supreme Court of BC (which heard the appeal), found that there had been nothing unusual about the manner of the accused's driving, and there was no evidence of any lawful signal for the accused to stop for police. Two police cars were apparently stationary on the side of the road "with twirling lights". This and a vague waving of white flashlights in the night by police had not amounted to such a signal.

Seemingly the accused was subsequently stopped and had searched the glove compartment for documents. This had not revealed any evidence of impairment; neither was there in the circumstances any requirement by law for the accused to leave his car, found the Court. The only evidence police could give to substantiate their reasonable and probable grounds to make a demand of the accused to give samples of his breath was that his eyes were watery and red and that a "moderate odour of alcoholic beverage had appeared to come from the inside of the car." About this evidence the court held:

> "Whether or not these factors would have been sufficient to create in the mind of a reasonable man a suspicion that the accused was guilty of the offence of impaired driving, I am satisfied that they are insufficient to constitute reasonable and probable grounds for a belief to that effect."

The accused had co-operated with police to the extent the law required him to co-operate. That he did not co-operate further to not reveal evidence that would assist the prosecution is a matter of speculation. A citizen who understands his legal rights and in circumstances as these exercises them may not "elicit judicial sympathy", but should neither be subject to adverse comment nor to adverse inference, held the Court.

Appeal was allowed
Convictions were set aside.

REASONABLE AND PROBABLE GROUNDS FOR ARREST AND SEARCH - ADMISSIBILITY OF COCAINE FOUND UPON BODY SEARCH

REGINA V. TUNNEY - Supreme Court of BC, Vancouver CC900159, August 1990.

A police officer testified that she and two other officers entered a establishment known to be frequented by drug traffickers. She spotted the accused (known to her as a trafficker) standing by a counter with clenched fists. Next to him was a woman who was holding an "open deck" containing white powder the officer believed to be cocaine. From experience she recognized the scene as one of a drug transaction where the woman was assessing her purchase. The officer believed that the accused had sold the woman cocaine and was holding more in his clenched fists. She arrested him for possession of a narcotic and gave the usual warnings. The officer's belief was verified as three "decks" of cocaine were found in the accused's hand. All this had taken place within a minute of her entering the establishment. She did not see anything change hands neither did she know the woman. The defence had successfully argued that the arrest and search had been without reasonable and probable grounds and that consequently the search of the accused had been an infringement of his right to be secure against unreasonable search and seizure. The evidence of the cocaine was held to be inadmissible by the trial judge and an acquittal resulted. The Crown appealed this decision to the BC Supreme Court.

The two main issues of this appeal were whether the officer had reasonable and probable grounds to arrest and search and the meaning of our exclusionary rule [s. 24(2) Charter]. The BC Supreme Court found that the trial judge erred in relation to both these issues.

In regards to the reasonable and probable grounds the trial judge had reasoned that there was a "gap"; an important link was missing if an objective test was applied. This gap was the lack of evidence of any interaction between the accused and the woman with the open deck of white power. This, as it were, had reduced the officer's grounds to the accused's clenched fists. Evidence of interaction between the accused and this woman would have bridged that gap. The Supreme Court held that if the trial judge's reasoning was correct the Crown was obliged to show more than reasonable and probable grounds as a requisite to the arrest and search. The trial judge had in fact required a burden of proof of at least establishing a *prima facie* case to show that the arrest and search were lawful.

Said the Supreme Court of BC:

> ".....the standard of proof that must be met in order to establish reasonable grounds is one of reasonable probability, not proof beyond a reasonable doubt or *prima facie* case, and that it is the totality of the circumstances that must meet that standard[10]" .....In my respectful view, the trial judge erred when he found that reasonable and probable grounds did not exist"

Having found that the arrest and search were lawful the issue related to the admissibility of the cocaine found in the accused's hands became superfluous. However, the Court considered the issue to be one of such importance that it should be reacted to.

The Supreme Court Justice pointed out how not only the very section of the Charter that creates our Canadian exclusionary rule but also the clear precedents set by the Supreme Court of Canada make that rule a conditional rather than an unconditional one.

Said the Court:

> "The 'fruit of the poisoned tree' argument does not prevail in this Country."

The Biblical text (Matthew 7:17) that no good fruit can grow on a poisonous tree, applied to the exclusionary rule, causes that rule to be absolute and unconditional. The trend-setting decision by the Supreme Court of Canada[11] clearly establishes that the rule is a conditional one (*Collins* case).

In principle and circumstances the Collins case is similar to this case under appeal. Ms. Collins was in a pub where she had been in the company of persons who when they had left the establishment, were found to be in possession of heroin. Police had entered the pub and did put the throat hold on her to prevent swallowing. Her mouth was clear but a balloon containing heroin was found in her clenched hand. When during the trial the officer began to relate in testimony what information he had to search Ms. Collins he got no further than, "We were advised....". At this point defence counsel had objected and argued that whatever the officer was advised of could not be admitted in evidence due to the hearsay rule. Needless to say this

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[10] R. v. Debot - Supreme Court of Canada - Volume 36, page 27 of this publication [1989] 2 S.C.R. 1140

[11] Collins v. The Queen - Volume 27, page 1 of this publication - [1987] 1 S.C.R. 265. Also see Volume 12, page 1 - (History of exclusionary rule - BC Court o appeal on R. v. Collins).

was wrong in law. For the purpose of establishing reasonable and probable grounds, to testify what one has been told, is permissible and does not violate the hearsay rule. The trial judge did not rule on the objection and the issue faded away in the proceedings. Consequently the Crown had not established the reasonable and probable grounds for the officer to search Ms. Collins, and the appeal courts had to deal with the issue of the search as though no such grounds existed. This left the Supreme Court of Canada to hold that the search was unreasonable and an infringement of Ms. Collin's right under s. 8 of the Charter. Although the Supreme Court of Canada did allow Ms. Collin's appeal and did set aside her conviction, it ordered a new trial for the exclusionary rule to be applied in accordance to their interpretation of s. 24(2) Charter. The Supreme Court of Canada had held that a violation of a Charter Right is by itself rarely a reason to exclude real evidence, particularly evidence that existed already. Furthermore, the bringing of disrepute in allowing evidence to be admitted or, for that matter to be disallowed, and the matter, of fair trial are kernel issues to be weighed.

The BC Supreme Court hearing the Crown's appeal in this *Tunney* case was very brief on these points. It held that the trial judge had erred when he excluded the evidence (cocaine) found in his (Tunney's) fists. It was a misconception of law to place the onus on the Crown to satisfy the Court that the evidence should be admitted. It was for the defence to show that it should be excluded as a matter of law.

Concluded the Court by applying the law as established in the Collins case:

> "....I am of the opinion that, even if there had been an infringement of the respondent's right under s. 8 of the Charter, the evidence relating to the quantity of cocaine found on the respondent at the time of his arrest ought not to have been excluded."

Crown's appeal allowed;
acquittal set aside
Referred to Provincial Court
for a new trial.

OFFICER SUSPENDING DRIVER'S LICENCE FOR 24 HOURS UNDER MOTOR VEHICLE ACT, THEN CHANGING HIS MIND MADE A DEMAND FOR BREATH SAMPLES

REGINA V. FURRY - Supreme Court of BC - New Westminster X027522, August 1990

Police arrested the accused on an outstanding traffic warrant. On the way to the Police Station and from observations after arriving there it became apparent to the officer that the accused (who had been encountered while driving his car) had committed a drinking/driving offence. The officer decided to dispose of the matter by suspending the accused's driver's licence for a period of 24 hours. The accused refused service and other problems arose over the suspension. The officer then demanded breath samples and the accused was convicted of over 80 mg.

The officer had not made the demand as soon as practicable after forming his belief that the accused had committed an offence within the preceding two hours. Consequently the Court was not entitled to presume that the blood/alcohol level at the time of analysis was the same as that level at the time of driving argued the defense upon appeal to the Supreme Court of BC.

The Supreme Court Justice implied that had this happened at the scene in direct sequence, it would not have interfered with the "as soon as practicable" prerequisite. However, in the circumstances as they were the moment had passed when the officer was entitled to make the demand.

Appeal allowed; Conviction set aside and acquittal substituted.

CROWN COUNSEL'S ADDRESS TO THE JURY TOO PREJUDICIAL AND NOT CORRECTED BY TRIAL JUDGE IN HIS INSTRUCTION TO THE JURY. ACCUSED TO BE TRIED AGAIN FOR MURDERING A POLICE OFFICER

ROMEO V. THE QUEEN - Supreme Court of Canada, No 21380 - January 1991.

In relation to a murder in New York State, the accused, a resident of that state was a suspect. Under the law of the State the accused was ordered to submit to the authorities in order to provide samples of his hair and blood. Instead the accused travelled to eastern Canada. In New Brunswick he was stopped by police for speeding. He shot and killed the police officer.

At trial he conceded that he had killed the officer but raised the defence of insanity. Psychiatrists for the Crown and defence testified, and in his address to the jury Crown Counsel had severely attacked the defence doctor. He told the jury that she was qualified but that due to his 30 years of experience as a lawyer, believing he had heard it all, the "fairy tales" she had told in her evidence were made up by someone. She is a very good witness he said, in that she can talk. She had related to the court delusions of monsters on the part of the accused. "Just as I said, the monster is cast in front of us, and it boggles my mind. I've heard many stories but this one is the top."

The accused was convicted of first degree murder and his conviction was upheld by the Court of Appeal for New Brunswick. He then appealed to the Supreme Court of Canada. He like *Kamal Ratti*[13] claimed that the reverse onus contained in S. 16 C.C. was an infringement of the Charter's guarantee to be presumed innocent until proven guilty. This cause of appeal was rejected (see *Ratti*). He also argued that the evidence of him being a murder suspect in New York State was highly prejudicial and should not have been admitted. Also that the trial judge should have instructed the jury on the prejudicial remarks by Crown Counsel to the jury about his defence psychiatrist and her evidence. This failure had amounted to a misdirection he argued.

The accused's father had testified during the trial. He told the court that "sudden unexplained departures from home" always resulted in extended travel, and strange behaviour on the part of the accused. He also informed the court that this was all connected with the accused's mental illness. However the Crown had another likely explanation for the accused's sudden departure from home and adduced in rebuttal the evidence of him being a murder suspect under order to subject himself to surrender hair and blood samples. The father's evidence regarding the sudden departure was introduced as part of the insanity defence and the defence left itself wide open to

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[13] See page 34 of this volume.

this rebuttal as another likely reason for that departure. Although the prejudicial affect of this evidence was severe, the evidence was, in the circumstances, properly admitted. As the excessive Crown address to the jury had not been subject to appropriate remarks on the part of the trial judge's address to the jury the .....

Accused's appeal was allowed
A new trial was ordered.

DEFENCE OF INSANITY
MUST PERSON RAISING THE DEFENCE SHOW THAT INSANITY HAD DEPRIVED HIM OF KNOWING THAT HIS ACT WAS LEGALLY WRONG OR MORALLY WRONG?

KAMAL RATTI v. THE QUEEN - The Supreme Court of Canada, 21146, January 1991.

The accused decided to take his wife and two daughters back to his native India. His wife disagreed and left the family home for a short period. By the time she returned the accused had purchased airline tickets for himself and his daughters and had quit his job. On the evening of her return the accused killed his wife with an axe. He reduced her body to small parts and placed them in a suitcase after friends declined to assist him in removing the body. He had purchased the axe and suitcase on the day he killed his wife. The accused disposed of the remains in a river, cleaned his home and attempted to enter the US. All these facts were conceded at trial, but he claimed not to be guilty of murder by reason of insanity. The jury returned a verdict of guilty which was upheld by the Ontario Court of Appeal. He appealed this decision to the Supreme Court of Canada.

Expert psychiatric testimony had been given that the accused suffered from paranoid schizophrenia at the time of the murder. His delusions convinced him to be a prophet and that God wanted him to form an international government. Voices also told him that his family was cursed and must return to India. His wife would be corrupted if she did not comply with his wishes. Although he was aware that he was committing a crime, he believed it to be right to kill her as she would be reborn in India.

According to the Criminal Code of Canada every person is sane unless the contrary is proved. The onus to prove that is on the accused. This reversed onus of proof violates the presumption of innocence argued the defence. Section 11(d) of the Charter guarantees this presumption. The Supreme Court of Canada held that s. 16 of the Criminal Code was demonstrably justified in a free and democratic society. Consequently, s. 16 C.C., despite being an infringement of the presumption of innocence, is valid law. If this was not so the Crown would have to prove every one charged with a crime to be sane as an essential element of the crime.

The trial judge had instructed the jury that although the psychiatric evidence was given by an expert they were under no obligation to accept it. They had to consider the evidence the same as that of any other witness. They could accept all, part or none of it. The Supreme Court of Canada found no fault with this instruction.

In the course of their deliberation the jury returned to have a question answered. The C.C. provides that the insanity must have deprived the accused of the capability to appreciate the nature and quality of his act or omission or of knowing that what he did was wrong. The jury inquired if knowing an act is wrong means moral wrong, legal wrong or both. The trial judge

told the jury that they must consider if the accused's mental illness deprived him of knowing that his act was legally wrong. Although this instruction was correct at the time, the Supreme Court of Canada held in December of 1990[14] that section 16 means that a person must be deprived of knowing that his act is morally wrong.

Not being satisfied that the jury would have returned the verdict of guilty if they had been properly instructed on this issue .....

The accused's appeal was allowed and a new trial was ordered.

NOTE: In the *Queen v. Landry* (reasons for judgment rendered the same date as those in Batti) the Supreme Court of Canada did not order a new trial but acquitted the accused.

Landry also conceded to be responsible for the killing of the victim. He had also raised the defence of insanity and adduced uncontradicted evidence that he at the time suffered of a severe psychosis. He believed to be acting on God's orders to kill Satan. He knew that the killing was legally wrong, but his act had been one of a Divine mission that superseded man-made laws. The trial judge had also instructed the jury that the accused's diseased mind must have deprived him of knowing that his act was legally wrong. The jury returned a verdict of guilty which was set aside by the Court of Appeal for Quebec. The Crown unsuccessfully appealed this decision to the Supreme Court of Canada. It held that the sense of wrong doing the accused must be deprived of is moral wrong. In this case the Supreme Court of Canada concluded that had the jury been properly instructed the accused should have been acquitted.

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[14] R. v. Chaulk - S.C.C. No. 21012 and 21035.

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UNREASONABLE SEARCH RESULTING IN SEIZURE OF LARGE QUANTITY OF COCAINE - HONEST BUT MISTAKEN BELIEF ON THE PART OF THE OFFICER THAT SEARCH WAS LAWFUL - ADMISSIBILITY OF EVIDENCE

REGINA v. GRUNWALD - BC Court of Appeal - Vancouver CA 012126, January 1991

Information of an undisclosed nature from another Drug Enforcement Unit member caused a drug enforcement officer to investigate the accused. Surveillance team of six officers (including the officer who received the information) was organized and on the day in question the accused was observed and followed.

The accused was seen to make calls on pubs and "moved from place to place in his automobile". When walking to and from his car he excessively looked over both shoulders. At one pub a man came out to the car with the accused. A big grocery bag was handed to him from the car. The main investigator (Constable McG.) did not attach too much value to this transaction as the bag obviously weighted a few pounds. He did not believe the accused participated in a street transaction of that magnitude.

Subsequent to this the accused came out of a pub with a male companion and the two sat in the front seat of the accused's car. Constable McG. was observing them with binoculars from a distance of 40 yards. He saw the accused bring a blue bag from the rear seat. What was done with the bag he could not see as it was below his line of vision. Another officer also observed this incident from a different location but he did not see the blue bag. A third officer did a walk-by the car. He saw the two men in the front seat but did not see a blue bag. He testified that his view was obstructed by steamed up windows. This and minor discrepancies in relation to spans of time became apparent during the trial of the accused. These discrepancies were not resolved and the defence made much of them to say that Constable McG. had fabricated the alleged events to supply him with grounds to search the accused's car.

After this meeting in the accused's car the man departed not visibly carrying anything and the accused went to another pub. He had parked across the street of the establishment and walked to the entrance while "crowing" (looking from side to side).

Constable McG. testified, "I believed there were narcotics in that blue bag and I wanted to confirm my suspicion." Having an honest belief that he had sufficient grounds to conduct a search of the accused's car under s. 10 of the Narcotics Control Act, Constable McG. opened the car with a coat hanger and found the blue bag. It contained an amount of cocaine with a street value of $735,000.00 and $130,000.00 in cash. Shortly after the accused came out of the pub and was arrested for possession of cocaine for the purpose of trafficking. He was convicted and sentenced to 15 years imprisonment. He appealed to the BC Court of Appeal.

The defence argued that the search of the car had been unlawful and unreasonable and that the cocaine and money was not admissible in evidence. The basis for this submission was that the officer lacked the reasonable and probable grounds to carry out the warrantless search. To support his argument the defence pointed out the following:

1. There was no evidence of reliable information that the accused was in possession of or was dealing in narcotics;
2. There was no evidence that the shopping bag passed onto Mr. R. contained narcotics or that Mr. R was a person suspected of being a user or trafficker in narcotics;
3. There was no evidence that the man who sat in the accused's car when Constable McG. claimed he saw the blue bag was a user or purchaser of narcotics;
4. There was no evidence that the man (in 3 above) carried anything to the vehicle or took anything away with him when he left the car;
5. There was no evidence that the accused or anyone he met that day were involved in any way with narcotics.

Constable McG. conceded in cross-examination that he was "speculating" that drug transactions had occurred and that the search was carried out to "confirm my suspicions". Furthermore it was claimed by the defence that Constable McG. had tailored his evidence to render the search lawful as he perceived the law. Even with that, the evidence police claimed they had prior to the search did not show a reasonable probability that there were narcotics in the car. The totality of the evidence would not give rise to a belief in the mind of a reasonable person in the likelihood of the presence of narcotics.

With regard to Constable McG. tailoring the evidence to suit his purpose and misleading the Court, the Supreme Court Justice held that the officer had been candid; that the discrepancies of the evidence given by the officers were minor and insignificant with regard to the grounds to search; and that the Constable had a sincere belief that he had grounds to search. Constable McG. had not deliberately ignored the law.

However, the officer's beliefs were mistaken, not because of the unfortunate words he used in his testimony ("speculation" and "suspicion") but as the Crown had failed to rebut the presumption that a warrantless search is *ipso facto* unreasonable. In other words the Crown failed to show that the grounds prerequisite to a lawful search existed.

The Court (as did the Court in the *Tunney* case explained in this Volume) held that this does not mean that evidence is automatically inadmissible. Our exclusionary rule is not absolute or unconditional. As in the Tunney case the precedent by the Supreme Court of Canada (Collins) applied. The evidence was real and admitting it did not affect the fairness of the trial. The question was if the conduct of police, amounting to a Charter infringement, was deliberate, wilful or flagrant, or was it committed in good faith. Although the infringement of the Charter right not to be subject to an unreasonable search was not merely technical it was neither any of the above. Constable McG. was motivated by urgency to preserve evidence. It amounted to

an error in judgment and an honest but mistaken view of circumstances. By admitting the evidence we do not condone a deliberate unlawful conduct, concluded the BC Court of Appeal. Weighing this against the accused's criminal venture of considerable significance and the social harm of his large scale drug trafficking, a greater disrepute would be inflicted on the administration of justice if the evidence was suppressed than by admitting it.

Accused's appeal was dismissed

DISCIPLINARY HEARING AFTER A PUBLIC INQUEST EXONERATED A POLICE OFFICER OF BLAME IN A SHOOTING DEATH - JURISDICTION CRUEL AND UNUSUAL TREATMENT - ABUSE OF PROCESS

CROSS v. WOOD 59 C.C.C. (3d) 561 - Manitoba Queens Bench, September 1990.

In 1987, the Manitoba Legislature enacted the Law Enforcement Review Act. Included in this Act is a mandate for the Law Enforcement Review Board to order investigations into and conduct hearings regarding complaints lodged against municipal police officers that allege disciplinary defaults contained in the Act. This Board has the power to subpoena witnesses but the officer who is the subject of the complaint is not a compellable witness. Only when the Board is satisfied "beyond a reasonable doubt" may it find that the officer committed the disciplinary default and impose penalties ranging from reprimands to dismissal.

Constable C. of the Winnipeg Police Department encountered a Mr. Harper who pushed the officer down and attempted to take his service revolver from him. A struggle ensued and the revolver discharged accidentally killing Mr. Harper. Despite shortcomings in the police investigation into this incident the constable was "exonerated" at the conclusion of an inquest.

A public inquiry was also conducted by a committee under the "Act to Establish and Validate the Public Inquiry into the Administration of Justice and Aboriginal People." Although the hearing was completed no report as to its findings has yet been released.

When the Law Enforcement Review Board commenced a hearing into this shooting incident Constable C. petitioned the Court of Queen's Bench for an order of prohibition to proceed. The disciplinary default alleged by Mr. Harper's brother was "abuse of authority" by means of unnecessary violence or excessive force; oppressive or abusive conduct; and abuse of authority.

Constable C. argued that the Law Enforcement Review Act provides for this provincial Board to deal with matters which in essence relate to criminal law procedures which are exclusively a federal jurisdiction [s. 91 (27) Constitution Act 1867]. Consequently the Act is in whole or at least in part *ultra virus* the Manitoba Legislature. Not only are the proceedings in the nature of criminal law but also the disciplinary defaults alleged, submitted Constable C's counsel.

On this point the Justice of Queen's Bench disagreed with Constable C. The Administration of Justice is the exclusive jurisdiction of the provinces [s. 92 (14) Constitution Act 1867]. Police are the most visible element of the Administration of Justice and control and supervision of police conduct are within provincial jurisdiction. The purpose of the Board's hearing is not to determine criminal responsibility but to determine if a Constable should be disciplined for his alleged misconduct as a police officer. There is no conflict between criminal proceedings and the object of the Board. That there may be an overlap in that the manner of misconduct also constitutes a criminal offence does not cause the mandate of the Board to be unconstitutional.

Constable C. also submitted that yet another hearing by the Board after having been exonerated at the conclusion of a public inquest, constitutes "cruel and unusual treatment" contrary to s. 12 of the Charter. Although another hearing will undoubtedly be stressful it can hardly be characterized as cruel and unusual treatment held the court.

Finally Constable C. argued that the excessiveness of hearings into the incidents subsequent to exoneration constitutes an abuse of process. He seemed to remind Queen's Bench of its residual discretionary power to stay proceedings against him. The Justice responded that each hearing had a distinct objective and each of the boards distinct mandates. Consequently the hearing by the Law Enforcement Board will not relitigate matters already dealt with. The exclusive function of this Board is to determine if Constable C. committed a disciplinary default and, if so, determine what penalty ought to be imposed.

Application dismissed

MANDATORY PRE-TRIAL DETENTION FOR PERSONS CHARGED UNDER S. 4 OR 5 NARCOTIC CONTROL ACT UNCONSTITUTIONAL

REGINA v. PEARSON - 59 C.C.C. (3d) 406, Quebec Court of Appeal, September 1990.

Section 515 (6) (d) C.C. provides that a person detained and charged with trafficking in or conspiracy to traffic in a narcotic shall not be subject to a judicial Interim Release unless he shows cause why his detention is not justified. Pearson was charged with five counts of trafficking hashish and cocaine and was ordered detained pending his trial. He unsuccessfully applied for *habeas corpus* on the basis that the section is unconstitutional and consequently without force or effect. The superior court apparently held that since *habeas corpus* is an extra-ordinary remedy (dating back to the Magna Carte of 1215) it is not available where statute law provides for a remedy. Section 520 C.C. does provide for a judicial review of detention orders made under s. 515 C.C. and the accused's application should have been brought under that provision.

The accused appealed that decision to the Quebec Court of Appeal which seemed to have departed from the above mentioned rule. It held that the statutory provision for review of his pre-trial detention did not deprive the accused of recourse to *habeus corpus*.

The Court of Appeal noted that section 515(6) (d) C.C. does not provide for distinctions based on the nature of the narcotic, the quantity involved, the Crown's evidence, the accused degree of liability or his previous criminal record. The rule the section creates is solely based on the fact that the accused is charged with an offence under section 4 or 5 of the Narcotic Control Act.

The pre-trial detention and the fact that the accused must show just cause to be released are contrary to s. 11(e) of the Charter which guarantees the right to reasonable bail. This right is closely connected to the right to liberty and security of the person and the right to be presumed innocent until proven guilty which consist of the right to remain silent and the burden of proof being exclusively on the Crown. In essence the section provides for an arbitrary detention.

The primary consideration for detention is to prevent repetition of the offence or dangerous behaviour and ensuring the accused's attendance in Court. The secondary consideration is public interest including protection of the public. By enacting s. 515 Parliament infers that these offences justify the presumption of dangerous behaviour. Consequently, the section which treats the minor offender and major ones the same, is discriminatory and arbitrary in the approach it provides and is inconsistent with the concept of "just cause" in s. 11 (e) of the Charter.

The Quebec Court of Appeal ruled that section 515(b)(c) C.C. is of no force or effect. It allowed the accused's appeal and a writ of *hebeas corpus* issued.

INTOXICATED PERSON ENTERING A DWELLING HOUSE TO SEEK SHELTER AND TO SLEEP

REGINA v. JIMMY - Yukon Territory Court of Appeal. YU134/90, Whitehorse, February, 1991.

It was in the early hours of a very cold morning that the accused walked home in a highly intoxicated condition. He entered a home along his route and awoke the occupant inadvertently. The man phoned police who apprehended the accused asleep on a bed. He was convicted of entering the home without lawful excuse with the intent to commit an indictable offence therein. The accused appealed his conviction.

The Crown relied on the presumption contained in s. 349 C.C. It provides for the presumption that anyone who enters a dwelling house without a lawful excuse, has in the absence of evidence to the contrary, the intent to commit on indictable offence in that home. This is a mandatory inference rather than a permissive one. Unless there is evidence to the contrary, a conviction must follow if all other essential elements have been proved. Evidence to the contrary is any evidence which is not disbelieved and gives rise to a reasonable doubt about the intent to commit an indictable offence.

The accused had testified that the extreme cold weather had motivated him to enter the home. He also had told the Court about his advanced state of inebriation which had not contributed to the wisdom of his decision. In other words, he placed evidence before the court that his sole objective was to seek warmth and sleep. This, of course, is hardly an indictable offence. He argued before the Court of Appeal that this amounted to evidence to the contrary and consequently the trial Court had erroneously applied the mandatory presumption (s. 349 C.C.).

The totality of the evidence was not inconsistent with the accused's claim that shelter and sleep were the only objectives he had in mind. It was capable of belief and amounted to evidence to the contrary.

Appeal allowed
Conviction set aside

IDENTIFICATION EVIDENCE
SUSPICION VIS A VIS EVIDENCE

REGINA v. FOUTS - Court of Appeal for BC - Vancouver, CA 03337, March 1991

The accused together with another man, entered a jewellery store, grabbed a portable showcase with gold and silver items, and ran. The getaway car was found quite a distance from the scene of the crime. The accused was apprehended near the car and the showcase was found in a garbage container within 50 feet of the car. The glass of the case had a shoe print that exactly matched the accused's shoes. The accused was identified by two witnesses in an identification parade, but not categorically. He was also identified by these witnesses at the preliminary hearing and trial. The accused was convicted of theft over $1000.00 and appealed this verdict.

The accused had not adduced any evidence but had claimed that there was a reasonable doubt about identity. The trial judge had expressed ambivalence about the identification evidence. He had reasoned that neither witness would have carried the day in proving that the accused was the person they saw at the scene. However, considering all the ancillary evidence he had no difficulty in arriving at one conclusion without having any reasonable doubt. That was, that the accused had committed the theft.

Firstly, there was a problem with the shoeprint. The print on the showcase was absolutely identical with the shoe the accused wore at the time. However, the print had no distinguishing marks or features caused by the use of the shoe or during manufacturing it. Any shoes of the same make and size would match the latent print. Consequently no significance should be attached to this evidence argued defence counsel. In addition, the perfect match may not be connected to or be strengthened by the dubious and inadequate identification of the accused by eyewitnesses. At best, the evidence served to accumulate suspicion. Quoted the defence counsel, "You must never convict a man on one conviction; you must not convict him on a thousand suspicions".[15] Suspicions are incapable of amounting to proof.

The Court of Appeal disagreed with the defence position and held that the evidence of the shoeprint was cogent and tended to connect the accused to the crime. To reason that in the circumstances, more than two persons, wearing identical pairs of shoes without distinguishable markings would have access to the showcase is too far fetched and too removed from common sense to instruct a jury to ignore that evidence. It was not a matter of adding suspicion to suspicion but a matter of drawing a logical inference from circumstantial evidence.

Appeal dismissed
Conviction Upheld

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[15] Justice O'Halloran in *R. v. McDonald (1951) 101 C.C.C. 78.*

TID BITS

INFORMING A DETAINED PERSON OF RIGHT TO COUNSEL WITHOUT TELLING HIM OF REASON FOR DETENTION AMOUNTS TO INFRINGEMENT OF RIGHT TO COUNSEL

A police officer asked a motorcyclist if he had been drinking and was told in response that he (accused) had "a couple". The officer told the accused of his right to counsel and his right to remain silent. The accused then performed on demand a sobriety test at the road side and was told of the officer's belief in regard to his state of sobriety only, which was followed by a demand for breath samples. In other words, when the accused was informed of his right to counsel he did not know the nature of the offence committed or what charge he might be facing. The accused was convicted of over 80 mg. and appealed that conviction to the BC Supreme Court. The Court found that in the absence of knowledge of reason for detention a person cannot in any meaningful way exercise his right to counsel. Therefore the officer's failure to inform the accused of the reason for detention amounted to a breach of right to counsel. The analysis was the result of evidence that emanated from the accused and consequently the infringement of the accused's right to counsel caused that evidence to be inadmissible. Appeal was allowed and conviction was quashed.

Regina v. Longton - BC Supreme Court, Vancouver CC901025, December 1990

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EVIDENCE CONTRARY TO CERTIFIED ANALYSIS OF BREATH

The Crown did prove by means of a certificate and the presumption of equalization that the accused's blood-alcohol content was 260 mg. at the time of driving. He appealed his conviction for over 80 mg. claiming that he had produced evidence to the contrary. He had testified to have consumed two glasses and one bottle of beer and adduced expert evidence that the certified analysis was inconsistent with that consumption as well as with the symptoms of impairment to which the investigating officer testified. The trial judge had found it difficult to reconcile the analysis with the accused's drinking pattern. The accused in his appeal argued that the judge had relied on the certificate which he by his evidence to the contrary had invalidated. The BC Supreme Court found that the trial judge had not weighed the evidence to the contrary and had therefore erroneously relied on the certificate. Consequently a conviction based on the trial judge's reasoning could not stand and the conviction was quashed.

Regina v. Steckley - BC Supreme Court, New Westminster, X027608, May 1990

PROSTITUTION
CONSTITUTIONAL VALIDITY OF "SOLICITING" PROHIBITION

An undercover officer was approached by the accused while the former was parked at the curb. She asked him right away if he was a policeman. He said he was not but expressed concern to be spotted by police talking to her. She got into the car and the conversation continued apparently along the same lines as her original inquiry about his position. The evidence reveals that he eventually said to her, "Okay, I'm the Chief of Police". It must be assumed that this facetious comment convinced her as she grabbed his privates and promised a "good time". She then asked him how much money he had. When he indicated to have $500.00 available she responded "Okay, let's go." She was then arrested for soliciting. This case reached the Supreme Court of Canada with the accused claiming that the soliciting provisions in the Criminal Code of Canada infringed her freedom of expression. The Court agreed that it did but held that the section was demonstrably justified in our free and democratic society to curb the nuisance of such soliciting.

Accused's appeal dismissed.

Regina v. Stagnitta 56 C.C.C. (3d) 17 - Supreme Court of Canada, May 1990

For detailed reasons see "Reference re: s. 193 and 195 1 (1) (c) of the Criminal Code of Canada. 56 C.C.C. (3d) 65.

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IS AN ALCOHOLIC BEVERAGE "FOOD" FOR THE PURPOSES OF OBTAINING IT FRAUDULENTLY

The accused drank Vodka in a hotel bar and fraudulently signed the bill with the name of a guest in the hotel without that person's permission. He was convicted on a charge of fraudulently obtaining "food" [s. 364 (1) C.C.] and appealed to the Quebec Court of Appeal claiming that Vodka was not "food". In the French version of the Criminal Code the word "aliment" is used. The shorter Oxford English dictionary states that food is something one eats as opposed to drinks. The French Le Robert dictionary states that "aliment" means, "that which nourishes, is used or may be used for nutrition." Considering the dictum that where there is an inconsistency in the English and French wordings of an enactment an accused person is entitled to have the wording most favourable to him applied, it would seem that the word "food" and it's meaning would have to prevail. Furthermore where in the Code or other statutes the word food is used it is clear that it is distinct from liquids. Why would only in this case Parliament want to see drink included in food? The Quebec Court of Appeal concluded that the section is clear in what it prohibits and that "food" and "aliment" must mean the same to deter someone from ordering and consuming what a restaurant offers and use fraudulent means to avoid paying for it. His conviction was upheld.

Regina v. Tremblay - 57 C.C.C. (3d) 427

Note: One cannot help but envision someone drinking his soup instead of spooning it to avoid prosecution.

MAKING REPEATED PHONE CALLS WITH THE INTENT TO HARASS A PERSON S. 372 (3) CRIMINAL CODE OF CANADA

A former University Security Officer phoned the switchboard of that security office 14 times in a span of 8 minutes. Each time he said nothing and hung up. He was acquitted in Provincial Court as the calls "amounted to nothing during which nothing was said by anyone to anyone". Although this may have been annoying to the person answering the phone it did not amount to harassment. The Crown appealed the acquittal to the New Brunswick Court of Queen's Bench. The Justice of that Court held that the elements of the offence had been made out: 1. There were repeated calls, 2. there was no lawful excuse and, 3. there was an intent to harass. In relation to the latter element of the offence the Court held that it was not necessary that the party speaks. To harass is "to vex, trouble or annoy, continually or chronically, as with anxieties, burdens or misfortunes". Furthermore a telephone call is made when the recipient's telephone rings. The accused was convicted and discharged absolutely.

Regina v. Sabine - 57 C.C.C. (3d) 209.

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ENTRAPMENT

Although entrapment was not defined by the Supreme Court of Canada until 1988[16] as an abuse of the process of the Court (that may result in a judicial stay of proceedings after the Crown has proved the criminal allegation) it did apply to the investigation practices of police in 1984 when the accused *Meuckon* was importuned to sell cocaine to an undercover officer. *Meukon* who was convicted in 1986 of trafficking in cocaine took his plight to the BC Court of Appeal claiming that he is entitled to a stay of proceedings due to having been entrapped. The undercover officer had befriended the accused, did him favours and extended loans to him. One night he treated the accused to dinner and did spend $170.00 on drinks alone for himself, the accused and his (the accused's) son. The officer urged the accused on this occasion to sell cocaine to his prospective employer's son. Cocaine was supplied and the accused was convicted. The BC Court of Appeal found that the officer had gone beyond providing an opportunity for the accused to commit the offence and that it had not been considered if the accused would have committed the offence had he been merely provided with an opportunity to make a sale.

Conviction set aside
New trial was ordered

Regina v. Meuckon - 57 C.C.C. (3d) 193. July 1990.

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[16] Mack v. The Queen - Volume 33 page 48 of this publication.

VALIDITY OF "SOLICITING" PROVISIONS

Fitted with a body pack, Constable R. posed as a prostitute on a public street. The accused approached the constable and inquired about the costs and quality of sexual services she provided with the obvious intent to purchase those services. The officers on the receiving end of the body pack transmissions arrested the accused for soliciting. The Nova Scotia Court of Appeal found that the sections of the Criminal Code prohibiting such solicitations were violations of the freedom to communicate and associate. The Crown appealed this decision to the Supreme Court of Canada. By majority this Court held that the Code simply prohibits any "attacks" expressing activity of a "commercial nature". It does not target to restrict communication or association but a commercial activity. A restriction of such activity is by itself insufficient to show an interference with the freedom to communicate or associate.

Regina v. Skinner - [1990] R.C.S. 1235, May 1990.

Note: Entrapment and obtaining evidence by means of body pack were not raised[17] See also "Reference re: Criminal Code" (Man.) [1990] R.C.S. 1123, re: constitutional validity of prostitution provisions.

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[17] See Mack v. The Queen - Volume 33 page 48 of this publication
Regina v. Duarte - Volume 36, page 1 of this publication

USE OF POLYGRAPH TO INDUCE STATEMENT

A fire in the building the accused owned was according to investigators deliberately set. There was proof that the accused was at the time of the fire in the immediate vicinity of the building and he was held to be a suspect. He was offered a polygraph test and he voluntarily submitted himself to one after having been given the opportunity to phone a lawyer. He had waived his right to counsel at this stage. After 45 minutes on the instrument the technician informed him that he had failed. The accused had been and was again told that the test result was legally not proof of anything. Upon being told of the failing the accused asked what would happen now. The technician said he did not know until the truth was known. The accused then cried and confessed to the technician. He was turned over to the investigators after telling the technician he was prepared to tell them the truth. After having been reminded of his right to remain silent (but not his right to counsel) he made an inculpatory statement. The accused appealed his conviction for arson to the Quebec Court of Appeal claiming that the statement should not have been admitted in evidence as it was given involuntarily due to the inducement the polygraph test had amounted to. The Court of Appeal agreed and held that the accused (who before the test had denied involvement in the arson) had been induced by the test to give a statement. He had been told that he had failed the test and this had shaken his confidence and induced him to confess. The technician had first gained the confidence of the accused as a person who was removed from the investigation. Upon failure on the part of the accused he had changed his role to that of a police officer. Therefore the confessions to the technician and the subsequent ones to the officers were involuntary and inadmissible. Appeal was allowed and acquittal entered.

Regina v. Amyot - 58 C.C.C. (3d) 312, June 1990.

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INACCURATE APPLICATION FOR A SEARCH WARRANT

In an investigation of offences in relation to trading of shares on the Stock Exchange, police gained information sufficient to obtain a search warrant and a warrant for the accused who was about to leave the country. All this information was gained from authorized interceptions of the accused's telephone communications. This placed the prosecutor between "a rock and a hard place". The applications for the warrants would have to reveal the source of the information and that would jeopardize the ongoing investigation. He therefore advised police to identify their sources as "reliable and confidential", implying that it came from an informer or like source. The defence took the position that the issuing justice had been misled and that the practice by police had caused the search to be an unreasonable one, and an infringement of s. 8 of the Charter. The evidence was excluded under s. 24(2) of the Charter and the accused was acquitted. The Crown unsuccessfully appealed the acquittal to the BC Court of Appeal.

Regina v. Donaldson et al - 58 C.C.C. (3d) 294, August 1990.

SENTENCING

Mr. Reimer, a man with a record for robbery, theft, mischief, possession of stolen property, also had a problem with his driving habits and was convicted twice of dangerous driving and numerous other traffic offences. Returning from a corn roast in the middle of the night he was chased for six minutes and outran police until he, at a speed of 153 km (and a alcohol content of 1.30), lost control and collided with parked vehicles, killing three passengers in his car. He was arrested for Criminal Negligence causing death. After some period of custody awaiting trial he was released on habeas corpus. He fled to a neighbouring province where he stole a car and was chased again at very high speeds. This resulted in a conviction of dangerous driving. At the time of both incidents Mr. Reimer was disqualified from driving. Reimer was returned to Manitoba where he had missed his scheduled appearance on the Criminal Negligence charge. He was arraigned, pleaded guilty and received the maximum sentence of life imprisonment. This sentence was successfully appealed and it was reduced by the Manitoba Court of Appeal to six years. The reported majority reasoning of this appeal court is somewhat puzzling but is as follows: There was only one collision; the results and circumstances of the offence could have been worse; Reimer's speed could have been higher; the blood-alcohol level could have been higher; there was no evidence of protest from Reimer's passengers. Consequently the maximum penalty was not fitting. If this case was not so tragic, light could be made of the reasoning by this Court.

Regina v. Reimer - 59 C.C.C. (3d) 136, August 1990

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CONSTITUTIONALITY OF THE PHRASE "WHETHER HE BELIEVES SHE IS FOURTEEN YEARS OF AGE OR MORE" IN SECTION 146(1) C.C.

The accused Nguyen and Hess were charged in Manitoba and Ontario respectively with having sexual intercourse with a female person under the age of fourteen years. In both cases the Crown relied on that part of the offence section that states, "whether or not he believes that she is fourteen years old or more" to avoid having to prove knowledge on the part of the accused that the girl was under the age of fourteen years. The Supreme Court of Canada held that this phrase infringes sections 7 and 15 of the Charter of Rights and Freedoms and is consequently of no force or effect. The Court ordered new trials for the accused persons with the offending phrase deleted from the offence section.

Regina v. Nguyen and Regina v. Hess - 59 C.C.C. (3d) 161

RIGHT TO COUNSEL

The accused under demand to give samples of his breath made the investigating officer aware that he wanted to consult a lawyer. It was after midnight on a Saturday evening and the lawyer of the accused's choice was not available. The constable actively assisted the accused in contacting a lawyer who could give him advice. These efforts had gone on for about 30 minutes when the constable and accused were interrupted by the sergeant who came in the room to ready the breathalyzer. When the accused saw this he engaged the sergeant in a conversation about the hygiene of blowing into the instrument. The sergeant obligingly explained how things worked and particularly the sterile mouth piece. To all of this the accused responded, "I'm sorry, I refuse the breathalyzer test." He was convicted of refusing and appealed this conviction claiming that his right to counsel had been infringed. After the sergeant came in, the accused never got back to trying to contact a lawyer. From this the officer may have inferred that he had waived his right to counsel. They were not entitled to that inference in the circumstances. Police should have ascertained if the accused waived his right. The Crown argued that the half hour effort by the accused and constable had been reasonable. The Court responded that time alone does not determine the reasonableness of an accused's opportunity to legal counsel. His conviction was set aside.

Regina v. Rough - Supreme Court of BC, September 1990. New Westminster X025139.

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RIGHT TO COUNSEL - POLICE OBLIGATED TO MAKE SUSPECT AWARE OF AVAILABILITY OF FREE CONSULTATION AS ADVERTISED IN THE PHONE BOOK

The accused was properly under demand to give samples of breath to determine his blood-alcohol content. He was from "out of town" and did not know any lawyer in the town where he was found driving. He made the same claim when he was given the yellow pages. The officer then said "if you don't know one or cannot afford a lawyer there's always legal aid". A message was left on the answering machine of the legal aid service. Apparently the call was not returned and the accused blew. He was convicted for over 80 mg and appealed claiming that this right to counsel had been infringed. When the officer was cross examined he answered to one of the questions, ".....There's ads in the -- in the phone book stating, you know, first consultation free, such as that". He also admitted that he had not informed the accused of such free consultation. The BC Supreme Court held that it had been "incumbent on the officer to inform the accused of the existence and availability of counsel who would give a free consultation as advertised in the phone book".

Appeal was allowed and conviction was set aside

Regina v. Bethune - BC Supreme Court, Kamloops 36618. October 1990.

ATTESTING FALSELY THAT SUMMONSES WERE PERSONALLY SERVED AMOUNTS TO OBSTRUCTION OF JUSTICE

The accused, a former police officer, gained a contract with a municipality to serve summonses on alleged parking by-law violators. His experience of serving process when he was a police officer contributed to him being the successful candidate for this contract. He was paid for every summons personally served, proof of which was done by affidavit. As too many persons subject to bench warrants for non appearance claimed that they were not personally served with a summons, fictitious summonses were given to the accused for service. He submitted affidavits of personal service in relation to the dummy summonses and was consequently convicted of obstructing justice and defrauding the municipality. He was sentenced to nine and three months imprisonment respectively. Sentences to be served concurrently. The BC Court of Appeal dismissed the appeals from conviction but reduced the sentence for obstruction of justice to sixty days imprisonment.

Regina v. Pawlitschek - BC Court of Appeal, Vancouver CA 01143, October 1990.

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CITIZEN GOING TOO FAR IN ATTEMPTING TO STOP A PERSON WHOM HE HAD FOUND COMMITTING AN INDICTABLE OFFENCE, FROM DRIVING AWAY

The accused's car was rear-ended by Mr. V who drove away from the scene. The accused, with 3 relatives as passengers in his car, followed V who drove into a driveway (which turned out to lead to V's home). The accused blocked the driveway and walked up to V's car. V by this time had locked himself in the car and was just sitting there with his engine running. The accused was afraid V would take off again and he kicked in the driver's door window to remove the keys. Mr. V was intoxicated. Although the accused believed to be justified in what he did, was found guilty of mischief and received a conditional discharge. He appealed this decision to the BC Supreme Court. The trial judge had held that the accused who could effect a lawful arrest of Mr. V had used excessive force. He found that the accused had not approached the V car with the intent to arrest V, but had in anger kicked in the window. Mr. V. had been blocked in and one of the passengers had gone to phone the police.

The Appeal Court agreed that the accused did not effect an arrest. He had attempted to stop V from driving away again and he was entitled to do so. However, in the circumstances, the accused went too far when he kicked in the window. The appeal was dismissed.

Hans v. The Queen - BC Supreme Court, Vancouver CC901118, December 1990.

EXHAUSTED DRIVER FALLING ASLEEP AT THE WHEEL
DANGEROUS DRIVING

The accused drove on a four lane highway and strayed to the wrong side of the road colliding head-on with an oncoming car causing grievous bodily harm to the driver of that car. He was convicted of Dangerous Driving, but appealed claiming that a prerequisite to that offence is proof that there was a persistence in conduct that accused driver knew to be dangerous. The evidence showed that due to work the accused had been "exhausted". He had gone for something to eat and drank two cans of beer. This was less than 30 minutes before the collision occurred. As far as he knew he was driving normally and the only cause he could suggest for driving in the opposite lane was that he had dozed off. These facts do not support dangerous driving argued defence counsel before the BC Court of Appeal. The accused's driving conduct was exclusively inadvertent and without any knowledge that his driving was negligent or dangerous. Consequently the accused had not persisted in anything he knew to be dangerous. The BC Court of Appeal responded that driving while being knowingly exhausted, with a blood-alcohol content of approximately 50 mg, is a sufficient departure from the standard of an ordinary prudent individual to support the conviction.

Regina v. Mason - BC Court of Appeal, Vancouver CA012591, September 1990.

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SEXUAL ASSAULT - ACCUSED CLAIMING ACT WAS CONSENSUAL - ACCUSED OFFERS POLYGRAPH TEST AND POLICE DECLINE THE OFFER - ADMISSIBILITY OF EVIDENCE OF OFFER AND REFUSAL

The accused conceded that he had sexual intercourse with the complainant but was astounded when arrested for sexual assault as according to him, the act was consensual. He immediately offered to take a polygraph test which police declined. After a *voir dire* the trial judge allowed the defence to put in evidence the offer and the refusal in order to bolster the accused's credibility. This amounted to "oath helping"[18] and the trial judge erred in law in allowing the defence request. The trial was exclusively a match of credibility between the complainant and the accused. Needless to say that one can draw a formidable inference from the accused offer to put his credibility on the line by offering to take a polygraph test. It will never be known how much of an edge the accused gained with the jury when he was allowed to put this inadmissible evidence before them. The jury returned a verdict of acquittal and the Crown appealed to the Nova Scotia Court of Appeal for an order for a new trial. The Court of Appeal agreed that the trial judge had been wrong and that the evidence was inadmissible. However, the Crown failed to show that this evidence had a significant influence on the jury and they rejected the suggestion of a new trial.

Regina v. Bedgood - Nova Scotia Court of Appeal - 60 C.C.C. (3d) 92. September 1990.

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[18] The Queen and Beland and Phillips - Volume 29, page 9 of this publication. Supreme Court of Canada, October 1987.

CAN A CONVICTION FOR IMPAIRED DRIVING RESULT WHERE THERE IS NO EVIDENCE OF AN ANALYSIS OF A BODILY SUBSTANCE?

The accused changed lanes without signalling, then crossed a median driving some distance in a lane designated for traffic going in the opposite direction and entered a controlled intersection where she collided with a car that was stationary in the middle of that intersection awaiting for traffic to clear to make a left hand turn. She was abusive to people who were concerned about her being injured and she wanted to leave the scene. The witnesses were not of much help to the Crown in terms of the accused's sobriety. However the investigating officer was very experienced and had investigated more than 500 impaired driving cases. He closely observed the accused at the scene, in the ambulance and at the hospital and he gave detailed evidence of the symptoms of impairment he observed. The trial judge concluded that these symptoms were not caused by injuries and the accused was convicted of impaired driving despite the fact that no breath or blood samples where taken. The accused appealed to the Supreme Court of BC that the evidence of the constable had not amounted to proof beyond a reasonable doubt and could therefore not support a conviction. The Supreme Court Justice held the whole of the evidence (the driving and the physical symptoms) justified the guilty verdict.

Deverteuil v. Regina - Supreme Court of BC, Vancouver CC901329, January 1991

Note: This synopsis was written to dispel the popular but erroneous belief that an analysis of a bodily substance is an essential element of the Crown's case to successfully prosecute a person for an impaired driving offence.

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STATEMENTS MADE TO I.C.B.C. ADJUSTERS CANNOT BE INTRODUCED IN EVIDENCE BY THE CROWN

The accused was charged with dangerous driving causing death. The Crown called the I.C.B.C. adjuster to whom the accused had given a statement about the details of the accident from which the charge arose. The statement was given in compliance with the Insurance Motor Vehicle Act applicable to I.C.B.C. That Act also provides that such a statement cannot be made public other than under certain conditions, none of which applied to these criminal proceedings. Needless to say defence counsel objected to the introduction of that statement not only on the basis of the above mentioned restrictions but more so that if such a compulsory statement can be adduced it is tantamount to an accused person having to testify against himself. Applying the remedial powers granted the judiciary under s. 24(1) of the Charter of the Supreme Court of BC ruled that the Crown could not introduce the statement the accused made to the I.C.B.C. adjuster.

Regina v. Spyker - BC Supreme Court, Vancouver CC890847, November 1990.